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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 252

MRS. L. E. WILLIAMS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR SON, JOHN EARL WILLIAMS,

Petitioner,

versus

GREAT SOUTHERN LUMBER COMPANY,

Respondent.

BRIEF ON BEHALF OF PETITIONER.

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THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is reported in *13 Fed. (2d), 246.*

The opinion of the Circuit Court of Appeals is reported in *17th Fed. (2d), page 468.*

JURISDICTION.

The date of the judgment to be reviewed is February 17th, 1927. (R. 1084). The Court of Appeals

denied an application for a rehearing on March 30th, 1927. (R. 1096).

The jurisdiction of the District Court is founded upon diversity of citizenship under Sec. 24 of the Judicial Code; that of the Circuit Court of Appeals under Sec. 128 of the Judicial Code, as amended by the Act of February 13th, 1925, Chap. 229, 43 Stat. L. 936, and the jurisdiction of this Court on *certiorari* is invoked under the provisions of Sec. 240 of the Judicial Code as amended by Act of February 13th, 1925. The jurisdiction of this Court is, therefore, solely statutory and indisputable.

STATEMENT OF THE CASE.

PLEADINGS.

Mrs. L. E. Williams, a citizen of the State of Louisiana, residing in the City of New Orleans, for herself and on behalf of her minor son, John Earl, 8 years of age, as his tutrix, filed this suit against the Great Southern Lumber Co., a Pennsylvania corporation, owner and operator of a sawmill at Bogalusa, Louisiana.

She charged that her husband was brutally and maliciously killed without any cause or provocation, at his own home and place of business in the lumber town of Bogalusa, by the white guards, agents, officers, and employees and gunmen of the defendant company, acting within the scope of their employment and for the benefit of the company, in furtherance of a conspiracy

by the said *tort feasors* with others, to kill L. E. Williams and his associates for the only reason that Williams was organizing the white and negro laborers of the defendant's company's lumber mill in a labor union, the motive being to remove him from that sphere of activity and thus destroy organized labor in Bogalusa; but that even if a conspiracy could not be amply proven, yet the company would be responsible for the alleged wrongful and tortious acts of its agents and employees acting within the scope of their employment and authority for the benefit of the company. (R. 2-7; 10-13).

The defendant denied said charge and alleged substantially that plaintiff's husband had been shot and killed by a duly appointed and qualified posse of peace officers appointed by the Police Commissioner while he was unlawfully resisting such officers in attempting to serve warrants which had been issued by the Court of the Town of Bogalusa, for the arrest of Sol. Dacus, a negro labor leader, and Bouchillon and O'Rourke, white men, who were charged with disturbing the peace. (R. 17-22).

Defendant filed an exception of want of capacity in plaintiff, as the mother, to sue on the ground that she had not qualified as tutrix of her minor son, and together with it, an exception of no cause of action or vagueness. (R. 7).

On the trial of these exceptions the Court ordered the plaintiff to amend her petition. (R. 9).

Plaintiff filed an amended petition (R. 10-12), alleging that she had then qualified as the tutrix of her

minor son and she expanded and amplified her original petition so as to show more clearly that her husband had been killed as a result of the conspiracy between the officers and agents of the defendant company and its employees acting within the scope of their authority and their employment and others; although in her original petition she had alleged sufficient facts to constitute a conspiracy, she had not used the word "conspiracy." (R. 10).

To this amended petition defendant interposed another exception to the effect that the amendment stated a new cause of action based on conspiracy, which had not been alleged in the original petition, and that, therefore, the second cause of action was prescribed under the laws of Louisiana. (R. 13-14).

The Court overruled this exception. (R. 16).

The defendant then filed its answer, alleging substantially that plaintiff's husband had been shot and killed by a duly appointed and qualified posse of peace officers of Bogalusa, while he was unlawfully resisting such peace officers in attempting to serve warrants which had been legally issued by the Court of the Town of Bogalusa for the arrest of Sol. Dacus, a negro laborer, charged as a dangerous and suspicious character, and Bouchillon and O'Rourke, who were charged with disturbing the peace. (R. 12-22).

Plaintiff thereafter filed a second supplemental petition by which she joined five of the conspirators who had been members of the mob which had killed Williams, and prayed for a judgment against them, severally and *in solido*. (R. 30-34).

To this supplemental petition there were exceptions filed similar to the exceptions filed by the Great Southern Lumber Co. (R. 35).

The Court overruled these exceptions. (R. 37).

The co-defendants then filed their answers, alleging substantially the same grounds of defense set forth by the Great Southern Lumber Co. (R. 40-58).

STATEMENT OF FACTS.

The Great Southern Lumber Co. built its lumber mill (one of the largest in the world) and established the lumber town of Bogalusa, in Washington Parish, Louisiana, over twenty-five years ago.

The company owned and controlled practically the entire municipality of Bogalusa and the property embraced within its limits, so that Bogalusa and the Great Southern Lumber Co. were interchangeable terms. (R. 282).

W. H. Sullivan, the company's vice-president, was acting president, executive officer, with full power and authority, the president being a non-resident and president only nominally.

Sullivan was not only acting president, but he was also the general manager of the plant and simultaneously mayor of Bogalusa. Through Sullivan, acting as president, general manager and mayor of the town, the company had absolute control of the town, could destroy its business, or wreck every man in the town, if he showed any independence. (R. 282-291).

When the mayor was absent E. R. Cassidy, whose brother, J. H. Cassidy, was assistant general manager of the plant, acted as mayor. (R. 276).

The company employed to operate its plant over 2500 men, of whom about 1000 were white and 1500 colored. (R. 954-962-1002).

L. E. Williams (called Lem Williams), plaintiff's husband, who was killed, was the president of the local labor union and operated a garage and repair shop on Columbia Street, Bogalusa's main street.

Some time before the killing involved in this suit, Williams called on Sullivan, on behalf of the labor union, to have him recognize the union (R. 449-952), and a committee of the union also called on Sullivan for the same purpose. (R. 449). His reply was that the company would not recognize union labor and would not consent to a closed shop. (R. 449-950-991-992).

Williams wanted to organize also a union of the colored laborers in Bogalusa, but Sullivan advised against it because he said it would create trouble on account of their race. (R. 954).

Thereafter no union laborer could get employment in the company's mill unless he first tore up his union card. (R. 1017; 1018; 1006-07-08-09; 1010-11-12-13).

Sol. Dacus, a colored union organizer, with the assistance of Lem Williams, Bouchillon and O'Rourke, two white labor union organizers, was endeavoring, notwithstanding Sullivan's adverse attitude, to or-

ganize the colored laborers of the mill in a union. (R. 1001; R. 626).

The refusal of the Great Southern Lumber Co. to recognize the labor union, and its opposition to the organization of the colored laborers into a union, created hostility between Lem Williams, his associates, the organizers of the labor union, both white and black, and the Great Southern Lumber Co. This hostility was manifested on several occasions.

At one time the electric lights and the water of the town, which were supplied by the machinery of the Great Southern Lumber Co., were cut off for twenty-four hours, Williams and his associate labor union men having gotten the employees to abandon their post.

The Great Southern Lumber Co., by way of protecting itself against the members of the union, had erected a high boarded fence around its mill property and stationed machine guns inside with armed men at the gates. It had a number of gunmen in its employ, and among them was Wiley Magee (the man who led the mob and killed Williams). (R. 998-99).

Such was the condition in Bogalusa on November 21, 1919, when a warrant was sworn out before the City Court of Bogalusa, charging Sol. Dacus with being a dangerous and suspicious character, presumably under an ordinance of the city (which, however, was never produced in evidence), and there is not such an offense known under the State statutes, and a warrant was issued for his arrest and delivered to the Police Department. (R. 153).

Dacus was not a suspicious character, for he was well known in Bogalusa, where he had his home and where he worked as a laborer in defendant's mill while the mill was in operation; nor was he in any way a dangerous character. But he was endeavoring to organize the colored laborers of the defendant's mill in a union, as he had a right to do under the law, so that the charge had been manifestly made maliciously to intimidate him and the colored laborers and destroy all possibility of organizing a colored labor union by lodging their leader in jail. (R. 626-1001-02).

On November 21, 1919, Dacus was not found and the warrant could not be served, but on November 22nd, about 11 o'clock A. M., he was seen on Columbia Street, walking between Bouchillon and O'Rourke, who were armed, Bouchillon on one side of him and O'Rourke on the other. The evident purpose which Bouchillon and O'Rourke had in view was to restore confidence in Dacus and his colored laborers and counteract the effect of the malicious warrant which had been issued for the purpose of intimidating him and destroying the union. (R. 863-977-978-927-28).

Dacus was thus seen by a police officer of the town enter Williams' yard with Bouchillon and O'Rourke and he immediately reported the incident to the chief of police, whereupon warrants of arrest were sworn out against Bouchillon and O'Rourke, charging them with disturbing the peace. These warrants of arrest were placed into the hands of Magee, not a regular police officer, but a special police officer, the Great Southern Lumber Company's noted gunman. (R. 280-

81-85-86-87-450-452-79-85-88-89-494-633-1035-37). (R. 1027-28-29).

At 1 o'clock P. M. the siren whistle of the Great Southern Lumber Co., the whistle which was blown every day at 6 o'clock P. M., as a signal for the laborers to stop work, which also had been used in an emergency when there was a fire, was blown. There was, however, no fire, no emergency, no riot at that hour, but the whistle was blown as a result of an agreement with the chief of police and the officers of the Great Southern Lumber Co., to summon the special police officers, a posse, so called, to arrest Dacus, O'Rourke and Bouchillon. In answer to that call there assembled at the City Hall about 75 men, armed with rifles, double barrel shot guns loaded with buck shots, and among them were Major Guerre, the superintendent of the Great Southern Lumber Company's plant; Paul LeBlanc, assistant manager of the plant and foreman of the company; Dr. Brister, superintendent of the company's hospital; Bob Carson, Mr. McElroyd and Wiley Magee, guardsmen of the company, and George Townsend, sales manager of the company, and many others who were not identified as employees of the company, because the books of the company, which were called for by a *subpoena duces tecum*, had been burned by the defendant company, the company claiming that it had destroyed these books according to its custom. But it developed that those books had been destroyed after this suit had been filed. (R. 990-91-92-93). (R. 581-84; 700-1001). (R. 60-62-63-64).

Williams was in his office writing on his typewriter when the mob arrived; he got up and walked to

the door and asked what the crowd wanted. Wiley Magee, the leader of the mob, replied "we want you," and simultaneously shot and killed him instantly, and immediately a volley of shots was fired by the members of the crowd into William's office, killing Bouchillon, O'Rourke and Richeau, Williams' brother-in-law; shots were also fired at the same time in the garage, killing Gaines, Williams' employee. (R. 234, 297-339-164-408-467-397).

In the mob no one was killed and no one hurt except Jules LeBlanc, who was slightly wounded in the arm, and the evidence shows that Williams' brother, Jim, after Williams, O'Rourke, Bouchillon and Gaines had been shot and were lying down on the floor, fired two shots at Jules LeBlanc, wounding him. (R. 165).

Dacus was neither killed, nor arrested, as he was not on Williams' premises.

Defendant's witnesses, members of the mob, testify that when they reached Williams' office he came to the door holding a gun in his right hand, whereupon Wiley Magee told him to put down his gun, and just at that moment a shot was fired from the inside of the building and Wiley Magee shot Williams and killed him instantly, and a volley of shots was fired into the building.

But Wiley Magee and others who were in the mob, when placed on the stand as witnesses at the trial of the case, claimed their constitutional privilege and refused to answer questions by plaintiff's counsel on the

ground that it would incriminate them. (R. 647-48-883-767-797).

The mob immediately took possession of Williams' office and garage, stationed guards at the door and refused to allow anyone to come in, and the preponderance of evidence is that they placed guns of their own on the floor next to the bodies of Williams, Bouchillon and Gaines in order to prove that the latter were ready to resist arrest. They carried these guns away, but they did not produce them in Court on the trial of this case. (R. 169, 209, 234, 238-243-247, 297-98, 320, 339-40, 360, 408, 476, 397-98, 360-358, 356-379-397-98, 408-476-77).

When the siren whistle of the mill was blown Sullivan, the general manager of the company, the executive officer and general manager of the company and the mayor of the city, was engaged at that unusual hour, 1 P. M., in playing a game of golf, and, although he heard the alarm whistle of his company's mill, he manifested no surprise whatever, took no interest in the occurrence, made no inquiry by phone or otherwise as to why the alarm whistle was sounded, but calmly continued playing golf. Nor did Sullivan in any way protest against the blowing of the whistle and the slaughter which it had caused, but, on the contrary, by his silence and his conduct thereafter, after his return, approved and ratified what had been done. (R. 959-960).

The trial of the case lasted ~~about four~~ over two weeks. (R. 159; 1044).

At the close of plaintiff's evidence the defendants did not move for a directed verdict, but, on the contrary, introduced their evidence, but at the close of all of the evidence defendants moved the Court to direct a verdict in their favor.

The Court denied the motion. (R. 1044).

The jury rendered a verdict for $50,000.00 in favor of petitioner, individually and in her capacity as natural tutrix, against, severally and *in solido*, the Great Southern Lumber Company and the five co-defendants. (R. 85).

Defendant filed a motion for a new trial (R. 86), assigning some twenty-three alleged errors, which motion was argued before District Judge Beattie, but Judge Beattie having died before rendering a decision, the motion was reargued before District Judge Dawkins, who found no error except as to the amount of the verdict, and dismissed the motion upon the plaintiff's entering a remittitur, reducing the amount to $30,000.00. (R. 90).

During the argument of the motion for a new trial before Judge Beattie, he suggested that the five co-defendants who had been made defendants with the Great Southern Lumber Co., had been improperly joined, whereupon, prior to the rendition of its judgment denying a new trial, the Court allowed plaintiff to amend her petition, striking out all of the five co-

defendants who appeared to be of the same citizenship as plaintiff. (R. 103).

Respondent then sued out a writ of error to the Court of Appeals assigning substantially the same errors which Judge Dawkins had overruled.

The Court of Appeals grouped and discussed the questions presented by the assignment of errors as follows:

1. Those relating to the amendments to the petition, made before and after verdict.
2. Rejection of evidence offered by the defendant as to what was said by O'Rourke and Bouchillon as they were walking along Columbia Street with Dacus on the morning on the day of the killing.
3. Permitting Mrs. L. E. Williams, the plaintiff, and other witnesses to testify that Bob Carson stated to them that they had come to kill Williams and that they had done it.
4. The refusal of the District Court to direct a verdict for the defendant.

There was judgment reversing the judgment of the District Court on the grounds of error numbered 2 and 3, and remanding the case to the District Court.

As this Court will review the whole case we shall argue all of the questions as grouped by the Court of Appeals.

ARGUMENT.

(I)

Defendant's Contention That the Filing of the Amended Petition by Plaintiff As Tutrix, After More Than a Year Had Elapsed, Was Barred by Prescription, Is Refuted by Both the Law and the Jurisprudence of Louisiana and by Sec. 954, U. S. Statutes, Which Is Paramount.

By Article 253, C. C. of Louisiana, it is provided that should the surviving mother (the natural tutrix) refuse to qualify (by taking the oath) she shall be bound to fulfill the duties of a tutor until she has caused a tutor to be appointed. Her duty was, therefore, to file suit.

In the *Monteleone case, 143 La., 354*, upon which defendant relies, the Court says that such an exception (as to capacity) must be filed *in limine* otherwise it is waived; it is waived, if filed with another pleading, such as an exception of vagueness or of no cause of action, which admits the capacity to sue; and the Court distinguishes the *Monteleone* case from the case of *Creagh v. New Orleans Ry. & Light Co., 120 La., 305*, and the case of *Williams v. Pope Mfg. Co., 51 La., 185*, in both of which the exception had not been filed *in limine.*

In the *Creagh* case the Court said:

> "We do not think that we should maintain defendant's exception, and dismiss the suit on the ground that plaintiff had no right to stand in judgment as she had not been qualified as natural tutrix at the time that

suit was brought. The general rule of law is that any person natural or artificial may sue in the Courts of the country."

In the *Williams* case the Court said:

"It is not improper for a mother to sue in the same action for damages accruing to her individually and for damages accruing to her minor child as the result of one and the same act of defendant. The fact that in the same individual, in two capacities, the right to sue resides, coupled with the fact of the common origin of the cause of action, determines the question presented in favor of that view which makes one suit suffice for both claims."

Now defendant filed its exception of want of capacity together with the exception of no cause of action, with reservation it is true, but defendant tried both exceptions together and the Court rendered a single judgment (not two judgments) ordering the petition amended, and both amendments were matters of form merely.

But as said in the *Monteleone* case, such an exception must be filed *in limine;* hence, it is merely an exception as to form and not as to substance. The District Court, therefore, correctly allowed the amendment, under the law of Louisiana. But his ruling was correct under the authority of Sec. 954, U. S. Comp. Stat. An., 98 U. S., 948, which is paramount, and is not regulated by the Conformity Act.

Rio Grande Dam Co. v. U. S., 215 U. S. 276.
Ex Parte Fiske, 113 U. S., 721.

In the case of *Quaker City Cab Co. v. Fixter, 4 Fed., 2nd Series, 328,* it appears that the plaintiff claiming damages for the death of her husband, filed suit as the administratrix of his succession, not personally as surviving widow. During the argument for a new trial the attention of the Court was called to the fact that the plaintiff had no right of action as administratrix of her husband's succession, but only individually as widow. The Court thereupon allowed her to amend, and allege that she was prosecuting the suit as widow, and not as administratrix. On this point the Court said:

> "The cause was removed to the United States District Court for the Eastern District of Pennsylvania. It was not discovered by anyone—at least attention was not called to it—that she had wrongfully entitled her cause of action until May, 1924, when a motion for a new trial was argued. It was then raised for the first time by counsel for defendant. More than one year had elapsed since the deceased died, and the statute of limitations prevented a new action from being instituted.
>
> "The trial Judge permitted plaintiff to amend by striking out etc. Defendant contends that this in substance constituted a new action and was error. * * * We think the amendment was one of form, and not substance, and in such case an amendment may be made under Secs. 948 and 954 of the Revised Statutes of the United States, Compiled Statutes, Secs. 1580-1591. Federal Courts

are very liberal in allowing amendments to prevent a miscarriage of justice.

McDonald v. Nebraska, 101 Fed., 171; 41 C. C. A., 278.

Murphy v. Stewart, 43 U. S. (2 Howard), 263-281.

Reardon v. Copper Co. (C. C. A.), 193 Fed., 189.

"The facts in the case of Van Doran v. Penn. R. R. Co., 93 Fed. 260 (35 C. C. A. 282) were practically identical with those in the case at bar. Suit was there brought as administratrix and not as widow. Plaintiff sought to amend by substituting 'widow' for 'administratrix.' This Court with reference to the allowance of the amendment said: 'Substantial justice requires that such an amendment should be allowed as a second suit for damages for the death of Henry Can Doren would be barred by the one-year limitation in the Pennsylvania statute."

Quaker City Cab Co. v. Fistxer, 4 Fed. 2nd Series, 328.

In the case of *Missouri, Kansas & Texas R. R. Co. v. Wulf, 226 U. S., 570,* the Supreme Court of the United States said:

"The amendment was clearly within Sec. 954, Rev. Stat. Nor do we think it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Sec. 6 of the Federal Employers' Liability Act. The change was

in form rather than in substance. Stewart v. B. & O. R. R. Co., 168 U. S. 445. It introduced no new or different cause of action, nor did it set up any different cause of action, nor did it set up any different state of facts as to the grounds of action, and therefore it related back to the beginning of the suit. Texas Pacific R. R. Co. v. Cox, 145 U. S. 593; Atlantic & Pacific R. R. Co. v. Laird, 164 U. S. 393."

The Supplemental Petition Did Not Change the Original Cause of Action Nor State a New Cause of Action, But Only Expanded and Amplified the Original Cause of Action Since Both Petitions Allege One and the Same Cause of Action, viz., One and the Same Single Wrongful Invasion of One and the Same Single Primary Right, viz., the Unlawful Killing of Williams.

Defendant contends that the supplemental petition changes the cause of action and states a new cause of action in that plaintiff bases her action therein upon a conspiracy, whereas in the original petition her right of action is founded upon the doctrine of *respondeat superior.*

Defendant is radically wrong, for a conspiracy is the combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose.

Duplex Printing Co. v. Deering, 254 U. S., 443.

Truax v. Corrigan, 257 U. S., 312.

In her original petition plaintiff alleges abundantly acts and facts which constitute conspiracy without, however, using the word "conspiracy"; she alleges that the unlawful killing was done by defendant, its agents and employees; by a mob composed largely of defendant's agents and employees and others who were deceived into joining them and, that by a prearranged plan of defendant's agents and employees, the siren whistle of defendant's mill was to be blown and was blown to assemble the mob, and after assembling they proceeded to the home of Williams and killed him.

In the second petition plaintiff amplifies merely the allegations of her first petition and uses the word "conspiracy" in doing so, stating the facts more in detail in compliance with the order of Court in order to satisfy defendant's exception of vagueness, which was styled an exception of no cause of action, but which the Court treated as one of vagueness under the authority of *James v. City of New Orleans, 151 La., 480,* in which the Supreme Court of Louisiana said:

> "Although defendant's attorneys denominated their plea of exceptions to the original petition an exception of no cause or right of action, it was, in substance and reality, an exception of vagueness or insufficiency of detail in the allegations of the petition. * * * As the motion did not set forth a new cause of action, it was error to say that the cause of action therein referred to was barred by

the prescription of one year subsequent to the filing of the suit.

McCubbins v. Hastings, 27 La. An. 713.
Landis v. Ill. Central R. R. Co., 140 La. 1, citing *Missouri, Kansas & Texas R. R. Co. v. Wulf, 226 U. S. 570."*

But conceding, *arguendo*, that plaintiff had not alleged conspiracy in the first petition and had alleged a conspiracy in the second petition, still the exception would not be well founded, because this being a civil action, it is not the conspiracy which is the foundation of the cause of action, but it is *the tort working damage to the plaintiff* by the conspiracy.

James v. Evans, 149 Fed., 136, 80 C. C. A., 240.
Bissell v. Beckwith, 33 Conn., 355.
Booker v. Puyer, 27 Nebr., 346.
Van Horn v. Van Horn, 56 N. J. Law.

But your Honors on the 16th of May, 1927, in *Baltimore S. S. Co. v. Philips, — U. S., 47, Sup. Ct. Rep., 901*, dispelled all contentions as to this point.

Your Honors said:

"In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and va-

riety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end.' They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.' Chobanian v. Washburn Wire Company, 33 R. I. 289 ('0 A. 400 Ann. Cas. 1913 D. 730). * * *

Berube v. Horton, 199 Mass., 421.

"Many other cases are to the same effect. In the case last cited there was a declaration in an action for personal injuries containing a count at common law alleging failure to provide a reasonably safe place, and a count under the Employers' Liability Act (Comp. St., Secs. 8657-8665), alleging a defect in the ways, works, or machinery. To this declaration, after the expiration of the period of the statute of limitations, an amendment was allowed alleging negligence of the defendant's superintendent as the cause of the same acci-

dent. The Massachusetts Supreme Judicial Court held that the statute of limitations could not be invoked because the amendment did not state a new cause of action, but was simply another statement of the same cause of action, that cause of action being 'the injury under the circumstances under which it took place.'

* * * * *

"The judgment of the court below, as shown by its opinion, was based, in the main if not entirely, upon Troxell v. Del. Lack. & West R. R., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed., 586, which was construed as holding 'that it was one cause of action not to furnish safe cars, and another to use safe cars carelessly.' The opinion in that case is not to be read as announcing any such general rule. If so, in the light of the foregoing discussion, we now should feel obliged to disaffirm it."

The Amendment Showing That Plaintiff Was a Citizen of Louisiana Was a Matter of Form and Not of Substance and Reverted Back to the Filing of the Original Petition.

This is too plain for argument. It is regulated by the very letter of Sec. 274, U. S. Judicial Code (c), as amended by Act of March 3rd, 1915:

"That where in any suit brought in, or removed from any State Court to, any District Court of the United States, the juris-

diction of the District Court is based upon the diverse citizenship of the parties, and such diverse citizenship exists at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court, upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or if it be a removal case, in the petition for removal."

Prior to the Act of March 3rd, 1915, the jurisprudence also was to the same effect:

Mexican Central R. R. v. Duthie, 189 U. S., 76.

Robertson v. Cease, 97 U. S., 646.

Chicago & C. R. R. v. Stephens, 218 Fed., 540.

Kinney v. Loan Co., 191 U. S., 78.

In *Realty Holding Co. v. Donaldson, 268 U. S., 1015*, your Honors said:

"It was, however, conceded by appellee in the court below, as well as here, that she was in fact a citizen of Michigan, and the Court below assumed the point. Since the defect may be cured by amendment, and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made, and dispose of the case.

The Dismissal of the Parties Bound Severally and, Therefore, Not Indispensable, Was Not Error and Did Not Affect the Verdict.

In *Horn v. Lockhart, 17 Wallace, 579*, your Honors said:

> "When objection is taken to the jurisdiction of the Court by reason of the citizenship of some of the parties * * * and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them."

Thomas v. Anderson, 223 Fed. Rep., 43.

Mason, et al., v. Dullingham, et al., 87 Fed., 689.

Grove v. Grove, 93 Fed., 867.

Ladew v. Tennessee Copper Company, et als., 179 Fed., 255.

Clark v. Chicago M. & St. P. Ry. Co., 11 Fed., 355.

See also *Fed. Rep. Dig., Vol. 2, Col. 3000, verbo Courts, Sec. 88; Ib., Vol. 6, p. 1876; verbo Courts, Sec. 318; Ib., Vol. 10, p. 347; Ib., Vol. 13, p. 432.*

In *Grove v. Grove, 93 Fed. Rep.*, the Circuit Court of Appeals said:

> "The retention of jurisdiction by the dismissal of indispensable parties is now a matter of every day practice. The power to

make dismissals and amendments for that purpose was settled long ago by Chief Justice Marshall."

In *Delaware Co. v. Frank, 110 Fed., 694*, the Court said:

> "Defendants contend that the bill cannot be dismissed as to any defendant not within the jurisdiction of the court without a *dismissal of the bill as to all defendants.* * * * An examination of the authorities convinces me that it *is well settled* that jurisdiction may be retained over defendants as to whom a diversity of citizenship exists, and a dismissal of the complaint may, and in proper cases will, be permitted against defendants who are not found to be within the jurisdiction of the Court, unless such defendants are indispensable to an entry of a decree against the remaining defendants and when it may be done without prejudice. Horn v. Lockhart, 17 Wal. 570; Oxley Stave Co. v. Coppers' International Union, 72 Fed., 695; Mason v. Dullingham, 82 Fed., 639; Grove v. Grove, 93 Fed., 865; Smith v. Oil Co., 86 Fed. 359."

In Clark v. R. R. Co., 11 Fed., 358, the Court said:

> "The plaintif brought his action against both the resident and non-resident defendants sounding in tort. Each defendant was liable as a wrongdoer if the defendant proved his case, and the controversy was severable."

In the case of *Mason v. Dullingham, 87 Fed., 689,* the Court held:

> "This action was joint and several and if the court below erred in its rulings the error was cured by the dismissal of King from the suit *after verdict and before judgment.* * * * Here the interest of the defendants were severable and the plaintiff had the right *at any time before judgment* to dismiss as to either defendant. Having dismissed as to those defendants over whom it is said the Court had had no jurisdiction notwithstanding the appearance, its jurisdiction cannot be impugned by the plaintiff in error here, as to whom the necessary diversity of citizenship existed, so that the jurisdiction of the Court over them is undoubted."

> "Plaintiff may amend by striking out or transposing parties whose presence on the record as the suit was brought would oust jurisdiction of the Court."

Corpus Juris, Vol. 25, Sec. 94, page 780.
McEldowney v. Card, 193 Fed., 475.

This rule applies only to parties who are dispensable and severally bound and not to indispensable parties. It applies only to parties against whom a separate suit might have been maintained independently of the others.

Judge Dawkins of the District Court, eminent jurist, ex-Associate Justice of the Supreme Court of

Louisiana, in the course of his opinion denying a new trial, said:

> "There is no doubt but that the action against the several defendants was and is severable. It is one in tort under Art. 2315 of the Revised Civil Code of Louisiana as to which it has been repeatedly held, in fact, has never been disputed that a plaintiff may sue one or more joint tort feasors without regard to the others, or having obtained a judgment against all may execute against one of them alone, and if they all be at fault neither has any recourse against the other, who is made to pay. It has also been held in some of the cases above cited (Mason v. Dullingham) that the dismissal may be made after verdict and before signing of the judgment. No authority to the contrary has been cited by the defendant."

Nor was the Great Southern Lumber Co. prejudiced by the dismissal of the five co-defendants on the ground argued by the defendant that the testimony of these defendants would have been given greater weight by the jury had they not been parties to the suit.

District Judge Dawkins ably refuted this point; speaking of these co-defendants, he said:

> "Most, if not all, (co-defendants) declined to answer certain questions as to their participation in the shooting which resulted in the death of plaintiff's husband, under their constitutional right to refuse to answer any question which might incriminate them, or

be used in a criminal prosecution, and the evidence otherwise showed that they, or most of them, were present, armed and participated in the undertaking which resulted in the death of Williams. The main question which the jury had to decide was as to whether the persons who visited Williams' place were engaged in the discharge of a *bona fide* and honest effort as officers of the law, to execute a valid warrant, or whether they were in reality helping the defendant, the Great Southern Lumber Company, to combat an attempt to organize and unionize the employees of that company."

Nor could the testimony of these tort feasors have been given greater weight, for, being severally bound with plaintiff, they would have still been interested witnesses although not defendants.

II.

The Exclusion of Statement of O'Rourke and Bouchillon, Not Error.

The Court of Appeals based its reversal on two errors. The first error, upon the ground that defendant had predicated its defense on showing that the posse which went to Williams' house had been legally created and was bent on serving the warrant of arrest with no ulterior motive, and, for that reason, the defendant was entitled to show that there was need of a number of officers instead of a single one to safely accomplish the arrest. Whose arrest?

Not Williams', for he was not charged with any offense and there was no warrant for his arrest. There was no justification, therefore to appoint a posse for his arrest, nor was there any need of a posse, since he was not to be arrested. Hence, the evidence as against plaintiff was not relevant.

If Judge Beattie had admitted the evidence on the ground that as against the plaintiff it was part of the *res gestae* as tending to show the need of a posse to arrest Williams, against whom no warrant of arrest had been issued, the ruling would have clearly been erroneous. The proposition is, we think, too simple for argument.

But, conceding that it was error to exclude the evidence even as against the plaintiff, although the remarks or words were uttered in Williams' absence and were clearly hearsay and irrelevant as to plaintiff, but conceding that they were relevant, and assuming that the posse was needed to safely accomplish the arrest and had been legally constituted, the exclusion of this evidence could not affect the substantial rights of the defendant, because the real and material issue before the jury was not whether a posse was needed to make the arrest, but whether the intrinsic character of the so-called posse, its extraordinary number, viz., 75 men armed with pump and shot guns and rifles, to arrest three men, its composition, viz., mostly officers and employees of the defendant, and summoned by the blowing of the defendant's mill whistle, what that posse did, its conduct, its achievement, the wholesale killing of those whom it went to arrest, did not reveal the so-called posse to have been not a

lawful posse, but a mob, which, under the guise and cloak and mask of a regularly appointed posse of special officers, were merely a mob of 75 armed men acting as the officers and employees of the defendant company within the scope of their employment, for the benefit of the defendant, bent, not on arresting, but on killing, Williams, Bouchillon, O'Rourke and Dacus, in order to remove them from the sphere of activity as organizers of the Labor Union, both white and colored, in order to destroy organized labor in Bogalusa.

Hence, the evidence which was excluded was immaterial and harmless and could not affect the substantial rights of the defendant, because an examination of the entire record will reveal that it was the intrinsic character of the posse, its composition and what it did, the malicious killing of Williams, Bouchillon and O'Rourke, and two others, and the destruction of labor in Bogalusa, which determined the verdict, regardless of whether the posse was needed to make the arrest and had been legally appointed.

The evidence shows that the mob was composed of about 75 men, heavily armed with rifles, pump-guns, double barrel shot guns loaded with buckshots, (R. 211-331-400-401-404-76-77-78-610-662-71-74-77-734-47-60-823-37-43-53-85-871-997); that they killed Williams, Bouchillon, O'Rourke, Gaines and Richeau without provocation. (R. 163-64-65-67-69; 214-15-97-98-99; 301-2-3-39-42-54-58-60-66-88-94-95-97; 400-1-2-18-19-48-76-77-79; 650-824-825-180-595-604-39-53-747-48-215-16-271-310-316-362-376-388-438-453-625-626-1001-613-647-48-883), and that the walls of Wil-

liams' office were riddled with buckshots. (R. 297-397-398-589).

The motive for the killing is shown by the testimony of W. H. Sullivan, general manager of defendant company, and, at the same time, Mayor of the Town of Bogalusa (R. 954), viz:

> Q. Did they suggest they were going to organize the colored labor?
>
> A. They said they had it in mind the first time, and we discussed it and I told them, as far as I knew conditions in the South, it would be a great mistake. The next time they came to see me, they said they had gone a little further and felt they could not make very much progress among Southern saw mills, unless they organized negro labor. I told them I feared if anything of that kind was attempted, it would probably create trouble of some kind.
>
> Q. You had reference to race trouble?
>
> A. Yes, sir.
>
> Q. How many negro laborers did you employ at that time?
>
> A. Well, at that time, we were employing, I think, about 2500 men, and about, as I recall it, about sixty per cent of them were darkies.

Among those who were in the mob were Major Guerre, manager of the defendant's lumber plant;

Paul LeBlanc, assistant manager of the plant, and foreman of the company; Dr. Brister, superintendent of the company's hospital; McElroyd, Wiley Magee and Bob Carson, guards of the company; Geo. Townsen, sales manager; Mr. Hold, employee of the company. (R. 163-64-74-99-217-18-27-318-21-22-34-36-39-44-45-95-96-400-1-4-50-52-53-76-88-89-93-94-95-466-613 616-621-22-25-28-29-83-84-721-928-29-32-281-360-998 999-1027-28-29-32-35-36 and 37).

Major Guerre, manager of the plant, and Jack Cassidy, assistant general manager, admitted that they were the ones who gave orders to blow the company's siren whistle as a special "riot signal" for the assembling of the mob, which, after having been assembled, proceeded in a large body directly to Williams' home to "intimidate" him. (R. 581-83-84-86-603-18-19-20-21-25-26-27-28-700-90-993-1001).

Hence, the instrinsic character of the posse and the horrible slaughter which resulted, revealed clearly to the jury the ulterior motive, so that the question whether there was need of a posse and whether it was legally appointed, became utterly immaterial.

III.

The Admission of Carson's Statement, Not Error.

The Court of Appeals based its reversal for the second alleged error upon the ground that Carson's statement "that they had come to kill Williams and had killed him," was hearsay and not part of the *res gestae.*

Our contention is that Carson's statement was admissible on all or any one of these several grounds:

(a) As a spontaneous declaration and, therefore, an exception to the hearsay rule.

(b) As an admission of an agent in the performance of his duty within the scope of his employment.

(c) As an admission by a co-conspirator or joint tort feasor in connection with the conspiracy and before the conspiracy had come to an end.

(a)

The evidence tended to show that Carson's statement was a spontaneous exclamation at a time when he did not have the opporunity to think or reflect; it was a spontaneous response to the actual sensation produced by the shock of the terrible slaughter and shooting, for the bodies of the murdered men were still lying where they had fallen, and Carson was on the scene of the killing, on the property of the deceased, heavily armed, his co-conspirators and co-tort feasors being also present and armed. (R. 484).

The principle applicable is expressed in *Wigmore on Evidence, Vol. 3, Sec. 1747*, thus:

> "Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness),

> and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may, therefore, be received as testimony to those facts."

Nor is this rule limited by time, for it is immaterial whether the statement be made one minute or twenty minutes after the accident, the sole question being whether the party making the statement did so under the excitement of the moment.

Corpus Juris, "Evidence," Sec. 539, p. 450.
Insurance Co. v. Mosley, 8 Wal., 407.
Beaver v. Taylor, 1 Wal., 542.
Quote *Jack v. Insurance Co., 113 Fed., 54.*

In *Missouri R. R. Co. v. Anderson, 198 S. West Rep.*, the Supreme Court of Texas said:

> "Questions of this kind must largely be left to the sound judicial discretion of the trial Judge who is compelled to view all the circumstances in reaching his conclusions and this Court will not reverse his ruling."
>
> *Corpus Juris, Evidence, Sec. 533, p. 448.*

(b)

There was affirmative and circumstantial evidence tending to show that Carson was an employee of the company, and the failure of the defendant to produce the payrolls which were called for by plaintiff by *subpoena duces tecum*, because they have been detroyed by defendant after the filing of this suit, is presump-

tive evidence tending to show that if the payrolls had been produced they would have revealed that Carson was an employee. The question whether he was an agent of defendant acting within the scope of his authority was, however, for the jury. (R. 63-485-88-89-279-80-81-94-864-65).

Jones on Evidence, R. E 536.

(c)

There was evidence tending to show that Carson was a co-conspirator and that the conspiracy was not ended, because Carson was still on the premises heavily armed as a guard and was keeping disinterested parties from coming in and, as such, manifestly keeping out disinterested witnesses who might be used as valuable witnesses against the Great Southern Lumber Co. in any damage suit resulting from the killing. (R. 864-871).

There was evidence tending to show that some of the conspirators were actually placing guns and ammunition in Williams' office to make it appear that Williams and his associates were prepared to resist them, and Carson was stationed as a guard for the purpose of stopping any outsider from entering the premises. (R. 478-79).

Hence, the statement was admissible as evidence not only upon one ground, but upon three grounds, one of which alone was sufficient.

But, assuming and conceding, *arguendo*, that the admission of the evidence was error as being hearsay, it could not possibly affect the substantial rights of

the defendant, because it added nothing at all to what the jury already knew. The jury knew that Williams had been killed; they knew that the mob had no warrant for his arrest, and, therefore, that they had not come to arrest him, but they knew that the mob had killed him, and they knew of the circumstances attending the killing, and since he was not to be arrested the presumption to kill him arose necessarily from the killing and the extraordinary circumstances surrounding the killing. Hence, the evidence was immaterial and harmless.

The Judgment of Reversal Was Contrary to the Weight of Authorities.

It is indisputable that the burden of proof to show prejudicial error from the whole record was upon plaintiff in error.

Armstrong v. U. S., 16 Fed. (2), 65.
Shuman v. U. S., 16 Fed. (2), 457.
Haywood v. U. S., 268 Fed., 795.
Simpson v. U. S., 289 Fed., 188.
Rich v. U. S., 271 Fed., 566.
Horning v. Dist. of Col., 254 U. S., 135.
Parker, et al., v. Elgin, 5th Fed., 2nd Series, p. 562; C. C. A., 6th Circuit.
Mitchell v. Pittsburgh Rd. Co., 13 Fed., 2nd Series, p. 704.

The trial of this case lasted more than ~~four~~ two weeks. A great mass of evidence was taken and a wide range of inquiry covered. Your Honors have said in *U. S. v.*

Trenton Potteries Co., decided February 21, 1927, *47 Sup Ct. Rep., p. 382:*

> "In such a case a new trial is not lightly to be ordered on the grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance."

(IV)

The Denial of the Motion to Direct a Verdict Was Not Error.

Under the jurisprudence *(vide Simkins*—a Federal Suit at Law, p. 123), the three following rules are controlling:

> *First:* If the plaintiff has introduced evidence bearing materially on the issues, which would be sufficient, if uncontradicted, to sustain a verdict, then no amount of contradictory evidence would justify the Court in taking the case from the jury and instructing a verdict.
>
> *Rockford v. Pennsylvania Co., 174 Fed., 81.*
>
> *Robinson v. Van Hoosen, 196 Fed., 625.*

> *Second:* Where the evidence is of such a character that reasonable men would differ as to the conclusions to be drawn from it.
>
> *Louisville & N. R. Co. v. Roberts, 177 Fed., 923, 924*, and cases cited.

Columbia Box & Lumber Co. v. Drown, 156 Fed., 459.

Penn Mining Co. v. Jarnigan, 222 Fed., 889.

Third: The mere fact that there is a preponderance of evidence on one side or the other, in favor of the party moving for a verdict, does not require the judge to take the case from the jury, even though it might justify a new trial, because of the preponderance of evidence against the verdict.

Rockford v. Pennsylvania, 174 Fed., 81.

City & Suburban R. Co. v. Svedborg, 194 U. S., 201.

Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 Fed., 463.

Chicago, M. & St. P. R. Co. v. Anderson, 168 Fed., 901.

Wood v. Petroleum Co., 294 Fed., 733.

Washington Gas Light v. Landsden, 172 U. S., 545.

Parsons v. Froridge, 226 Fed., 18.

District Judge Beattie, who presided at the trial during ~~four~~ five weeks, was convinced that plaintiff had introduced evidence bearing materially on the issues which was sufficient to sustain a verdict, since he denied defendant's motion for a directed verdict.

District Judge Dawkins, before whom the motion for a new trial was argued, was also of the same opinion and so expressed himself and he denied defendant's motion.

The Circuit Court remanded the case upon technical grounds relating to the admission and rejection of evidence, thereby indicating that the District Court had not erred in denying the motion for a directed verdict.

Counsel for defendant were also of the same opinion, since at the close of plaintiff's evidence, they did not request a directed verdict, but, on the contrary, introduced numerous witnesses in rebuttal of plaintiff's evidence.

The question whether plaintiff introduced sufficient evidence bearing materially on the issues must be answered by propounding four other questions:

(1) Whether there was sufficient material evidence tending to show that the killing was unlawful.

(2) Whether there was sufficient material evidence tending to show that the killing was a result of a conspiracy.

(3) Whether there was sufficient material evidence tending to show that the Great Southern Lumber Co. took part in the conspiracy.

(4) If there was no conspiracy, whether there was material evidence tending to show that the officials, superintendents, agents and employees of the company, acting in the course and within the scope of their employment, participated in the killing or encouraged, aided and assisted it.

(1)

The record shows that there was abundant material evidence introduced by plaintiff tending to show that Williams was at his typewriter, got up, went to the door and asked what the mob wanted, and that immediately Magee shot him, killing him instantly, and immediately there was a volley of shots fired by the mob and five men were killed. Test. Sumrall, R. 234, Bourgeois, R. 297, Garner, R. 339, James Williams, R. 164, Mrs. Melancon, R. 408, Mrs. Williams, R. 467, McAllister, 397.

(2)

The evidence was overwhelming tending to show that the unlawful killing was the result of a conspiracy, since there were seventy-five men heavily armed with rifles, pump-guns, shot guns, and they were summoned by the blowing of the siren whistle of defendant's mill according to a pre-arranged plan. "A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means." "Concert of action is a conspiracy if its object is unlawful."

Duplex Printing Press Co. v. Deering, 254 U. S., 443.
Truax v. Corrigan, 257 U. S., 312.

(3)

Did the Great Southern Lumber Co. participate in this conspiracy?

The evidence shows that the Great Southern Lumber Co. committed the first overt act in the plan of the conspiracy in order to carry out its purpose to unlawfully kill Williams, viz., it blew its siren whistle to summon the members of the conspiracy to the City Hall, so that they might go to Williams' office in a body and kill him, for there was not a warrant for Williams' arrest.

There was evidence tending to show that Jules LeBlanc, a member of the mob and of the conspiracy, who was seen standing with a shot gun next to Magee, when Magee killed Williams, and when the volley of shots was fired into Williams' office, was the one who was sent by the Chief of Police to the company's mill to ask Guerre, the superintendent of the mill to blow the siren whistle, and, immediately after the blowing of the whistle, that Guerre was seen among the mob at Williams' place, with a gun in his hand when Williams was killed, R. 174, 211, 233, 239, 341, 349, 493, and that McElroyd, the watchman of the Great Southern Lumber Co. was there with a gun, R. 488, and so was Paul LeBlanc, assistant superintendent of defendant company and that when the whistle blew a number of men were seen running into the stockade around the mill property of defendant. R. 361.

The evidence shows that Sullivan was president and general manager of the defendant company and simultaneously Mayor of the Town of Bogalusa, chief executive officer of both, and that the company prac-

tically owned and controlled the entire municipality of the Town of Bogalusa, so that it is beyond human credulity that he should not have known that the siren whistle was to be blown and the awful purpose for which it was to be blown.

There was evidence tending to show that at one o'clock p. m., an unusual hour, Sullivan was engaged in playing a game of golf and that he heard the siren whistle of his company's mill; that he was not surprised, made no inquiry, either by phone or otherwise, as to why the alarm whistle was sounded, but calmly continued his game, the irresitible inference being that he knew that the armored men were to be assembled by the blowing of the whistle and that they were going to Lem Williams' home to kill him, together with the other three Union labor leaders who were in Williams' office.

There was evidence tending to show that there was no personal animosity on the part of the members of the mob nor of the special police officers against Williams, but that the destruction of the Labor Union, both black and white, in Bogalusa which was in the path of the Great Southern Lumber Co. was the only motive for the killing of Williams and the other Labor Union leaders. K. 190-595-604-34-53-747-48

There was evidence tending to show that at the time of the blowing of the whistle there was no fire, no emergency, no riot; so that the blowing of the whistle was manifestly the call of the master, the Great South-

ern Lumber Company, and was not only a signal for the assembling of the so-called posse at the City Hall, but it was evidently a guarantee that, as the deed which was going to be done was solely for the benefit of the Great Southern Lumber Co., the company would protect them from prosecution and hold them harmless.

The evidence shows, as Judge Dawkins said:

> "That the Self Preservation and Loyalty League had as one of its purposes, acquiesced in by the defendant lumber company and participated in by some of its employees, the promoting of the stand taken by the defendant company in its deal with the labor union."

There was evidence to show that Sullivan by his conduct and silence approved and ratified Guerre's action in blowing the whistle and all that had resulted from it; and that the Great Southern Lumber Company derived the full benefit of the killing of the three leaders, for it resulted in the complete destruction of organized labor in Bogalusa, which the evidence tended to show was the *sole motive* for the unlawful killing.

(4)

But if there was no conspiracy, there was evidence to show that defendant's agents, employees, superintendents and officials were present, assisting, aiding and encouraging in the unlawful killing within the course and scope of their employment.

But Article 2324 of the Civil Code of Louisiana provides as follows:

> "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damages caused by such act."

There was evidence to show that Wiley McGee was a notorious gunman, employed by the Great Southern Lumber Company, during the trouble between the Union men and the Great Southern Lumber Company, and that Wiley McGee, while a special police officer, was paid by the defendant company. (R. 280-286-287).

The failure of the defendant company to produce its payrolls relating to the employment and payment of compensation to employees prior to and at the time of the killing, on the ground that according to its custom, it had destroyed the payrolls, which however were destroyed only after this suit had been filed, raises a presumption in favor of plaintiff, which is evidence. (R. 60-64).

There was evidence also tending to show that Wiley McGee was living in a house owned by the company and built for its employees. (R. 280).

In the case of *Cisco v. Looper, 236 Federal, 339*, the Court approved the following charge:

> "A person who is present at the commission of an assault and battery, and en-

courages and incites by words, gestures, looks, or signs, or by any other means, is 'aiding and abetting' the same, and is liable as a principal. You are then to determine, from all the facts and circumstances in the testimony whether these defendants, or any of them, encouraged and incited by words, gestures, looks or signs, or by any other means, the assault upon the plaintiff. The fact that a person is present at the commission of an assault and battery, or within a reasonable distance, so that he knows what is going on, without disapproving it, is evidence on which, in connection with other circumstances, it is competent for the jury to infer that he aided and abeted same."

There is evidence tending to show that besides Guerre and McElroyd and Wiley McGee, there were other members of the mob, employees of the defendant company, who took part in the unlawful killing, namely, Paul LeBlanc, assistant superintendent of the defendant company. (Tr. p. 175). Townsend, sales agent; Brister, employed in defendant's hospital, and Carson. (Tr. p. 485). When the whistle blew, a number of men were seen running into the stockade around the mill property of the defendant company. (R. 361). Another witness testified that when the whistle blew he saw a number of men coming out of the mill supply warehouse of the defendant company, inside of the stockade, armed with guns, and that they went out through the gates used by employees of the defendant company. R.1027-28-29.

There was evidence to show that Guerre, who was superintendent of the company, actually participated in the unlawful killing. (Tr. pp. 174, 211, 233, 321, 339, 341, 345, 396, 400, 401, 452, 466, 488, 489, 493).

The question before the jury was—not whether these men were employed to kill Williams—but whether the course and scope of their employment furnished the motive and purpose for the killing as distinguished from any personal and private animosity of their own.

Schultz v. Brown, 256 Fed., 190.

It was solely within the province of the jury to determine from all the surrounding circumstances whether these employees whose acts had caused damage—were acting within the scope of their employment.

In the case of *Schultz v. Brown, 256 Federal, 187, U. S. Circuit Court of Appeals, 9th Circuit*, the Court said:

> "We think this evidence was sufficient to take the case to the jury, and that it was for the jury to determine whether upon such evidence Heintz at the time he made the assault upon Brown, was acting within the scope of his employment, and not from any personal or private animosity of his own. * * * With respect to the course and scope of Heintz's employment, it is not claimed that he was employed to assault Brown. The claim is that the course and scope of his employ-

ment furnished the motive and purpose of the assault, as distinguished from any personal or private animosity of his own."

In *Goodman v. Traction Co., 175 Federal, 63*, U. S. Circuit Court of Appeals, 7th Circuit, Judge Lurton—the Court said:

> " * * * The liability and non-liability of the defendant turns upon the fact as to whether or not the inspector was acting within the scope of his employment when he made the assault. How that fact is, must be determined from the conflicting testimony and this is a special province of the jury."

The Special Officers—So-Called Posse—Were the Agents and Employees of Defendant.

If the unlawful killing was done by special officers commissioned by the City of Bogalusa, the plaintiff is not relieved from liability, because, as was said by Judge Dawkins, the evidence shows that the Self Preservation and Loyalty League had as one of its purposes, acquiesced in by the defendant lumber company and participated in by some of its employees, the promoting of the stand taken by the defendant company in its deal with the Labor Union.

Seymour v. Director General of Railroads, 290 Fed., 294, the Court said:

> "A railroad company employing a servant who happens to be a public officer, acquires no immunity from such employment.

Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employe are to be used for the benefit of the defendant and in protection of its interest and property, and in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously and in pursuit of some purpose of his own, the defendant is not bound by his conduct; but if, while acting within the general scope of his employment, he simply disregards his master's orders, or exceeds his powers, the master will be responsible for his conduct.

"It was ruled that under the evidence it was a question for the jury whether Wheeler, when he fired the fatal shot, was acting as defendant's servant or as a public officer."

The evidence tended to show that one of the purposes of the League and of the special officers was to fight the battle of the Great Southern Lumber Company against the Labor Union, and the defendant company alleges in its answer (R. 21)—that it had applied for protection:

"For some time prior to the date alleged in the petition, various persons had unlawfully assembled in said city of Bogalusa, had threatened to commit, and had committed,

> breaches of the peace, and had trespassed upon and had made threats to destroy defendant's property. Defendant had applied to the authorities of said city for protection."

In the case of *Penn. Mining Co. v. Jarnigan, 222 Fed., 889*, the Court said:

> "If the guards acted within the general scope of their authority the company is responsible for what they did, although they acted wantonly. Denver & Rio Grande R. R. Co. v. Harris, 122 U. S. 597; Lake Shore R. R. Co. v. Prentice, 149 U. S. 101; Stewart v. Wright, 147 Fed. 321; Southern Express Co. v. Patton, 93 Fed. 936. When the evidence and circumstances are open to conflicting inferences, the question whether the acts were within the scope of the agent's authority is for the jury."
>
> *Penn. Mining Co. v. Jarnigan, 222 Fed., 889.*

Hence, even if there had not been a conspiracy, which, under the evidence is unthinkable, defendant would still be liable, for, according to its own defense and judicial admission, it sought in its fight against the Labor Union the co-operation of the town of which its own executive was the executive with full power, and, therefore, the so-called posse or special officers appointed by the town, who unlawfully killed Williams, or aided and assisted in killing him, were the agents and employees of the Great Southern Lumber Co., *pro hac vice*, and were acting in the course and within the scope of their employment for the sole and exclusive benefit

of the defendant company, and they carried out successfully the purpose of their employment for the killing of the three leaders destroyed the Union completely.

CONCLUSION.

We respectfully submit therefore that the judgment of the District Court is without error; that all of the exceptions interposed by defendant were without foundation; that there was error in the judgment of the Court of Appeals remanding this case for trial, and that this Court should reverse the judgment of that Court and affirm the judgment of the District Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 252

MRS. L. E. WILLIAMS, INDIVIDUALLY, ETC.,
PETITIONER,

vs.

GREAT SOUTHERN LUMBER COMPANY,
RESPONDENT.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

POINT I.

The material issue is this: Was Williams killed unlawfully (without provocation at the time he was killed) or was he killed lawfully while resisting the officer in making the arrest of Dacus, Bouchillon and O'Rourke? That was the question which the jury had to solve.

If Williams was killed unlawfully, whether a posse was needed to make the arrest was manifestly immaterial, since a posse was appointed and killed him unlawfully. Whatever was said or whatever threats were made by Bouchillon and O'Rourke two hours before the killing and a mile away from the killing was also manifestly immaterial, since Williams was unlawfully killed.

But it is a fact that the trial judge allowed Witness Magee, chief of police, to testify that from the reports which he had received it was, in his judgment, advisable to appoint (a posse) special officers to assist the regular officers in the execution of the warrants (R., 142, 141, 143, 145). And he appointed them. Hence the jury had this evidence as to the need of a posse; the reason for judgment given by the circuit court, viz., the need of a posse, falls in the light of the record.

It will be noted, moreover, that there was no warrant for Williams' arrest; there could therefore be no need of a posse for his arrest.

The whole burden of opponent's argument and brief is to show that at some remote time, three weeks or a month, before the unlawful killing, Williams and the Labor Union had given provocation. But that was immaterial, since the issue is whether he was unlawfully killed on that day.

Point II.

If Williams was killed unlawfully, Carson's statement that the posse had come to kill him is manifestly immaterial, since he was killed unlawfully, the unlaw-

ful killing itself showing the intent and purpose to kill.

We respectfully submit, therefore, that the circuit court was in error on both points.

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MAX M. SCHAUMBURGER,
Attorneys for Petitioner.

(10008)

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IN THE

United States Supreme Court.

OCTOBER TERM, 1926

No. 1128

MRS. L. E. WILLIAMS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR SON, JOHN EARL WILLIAMS,

Petitioner,

versus

GREAT SOUTHERN LUMBER COMPANY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and remanded the case for a new trial in conformity with the opinion and with law. (R-1084.)

The decision of the Circuit Court of Appeals is based upon prejudicial error resulting from the exclusion of evidence which the Circuit Court of Appeals found should have been admitted and from the admission of

evidence which the Circuit Court of Appeals found should have been excluded. (R-1084.)

The opinion of the Circuit Court of Appeals is sound, is based upon well established rules of evidence and supported by authority. The prejudice to the respondent (defendant and plaintiff in error below) resulting from the exclusion and admission of evidence is patent from a mere reading of the opinion of the Circuit Court of Appeals. It is obviously unnecessary to advance any argument to sustain the Court's views.

The facts, as recited in the petition, are not supported by the record and are refuted by the opinion of the Circuit Court of Appeals. However, it will serve no purpose to encumber this reply with any discussion of facts —especially in a matter of certiorari where basic principles and not controverted facts control.

This Court is asked to grant the extraordinary writ of certiorari to correct alleged errors concerning the admission and rejection of evidence.

This Court has repeatedly and consistently laid down the rule that "writs of certiorari will not be granted except in extraordinary cases" (*American Construction Company vs. Jacksonville*, 148 U. S. 372), or "in cases involving questions of importance which it is in the public interest to have decided by the Court of last resort" (*Magnum Company vs. Coty*, 262 U. S. 159), or, "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeal (*Layne & Bowler vs. Western Well Works*, 261 U. S. 387); and then only after final judgment, except when delay would seriously affect the public interest." (*Forsyth vs. Hammond*, 166 U. S. 506.)

The petition assigns four reasons why the writ should issue in this case. We take them up in their order.

First: "WHETHER RICH AND POWERFUL CORPORATIONS IN THE SOUTH SHALL DESTROY ORGANIZED LABOR, BOTH BY WHITE AND COLORED, BY UNLAWFULLY KILLING THE LEADERS OF ORGANIZED LABOR UNDER THE CLOAK OF LAW WITH IMPUNITY AND WITHOUT COMPENSATION."

This assertion is not borne out by the record. Williams was killed by police officers, regular and special, of the City of Bogalusa who were in command of the Commissioner of Public Safety and who were in the discharge of their duty executing warrants of arrest issued by a competent court. Petitioner's effort to establish a conspiracy, and to connect the respondent with an alleged conspiracy, to kill Williams failed.

The Circuit Court of Appeals, after finding that respondent was prejudiced by the admission and rejection of evidence, justifying and requiring a reversal of the judgment, said (R-1090):

> "Upon a subsequent trial, the evidence may differ from that presented in this record and it is unnecessary to pass upon its sufficiency to establish either or both of the grounds of liability relied upon by plaintiff to connect the defendant with the killing of the deceased. We do not think the present record contains direct evidence of conspiracy between the defendant, through its agents and strangers to kill deceased."

And the Court also stated that there was no evidence to show that Guerre, an employee of the respondent and an alleged member of the posse, was acting within the scope of his authority as an agent of the company. (R-1091.)

Second: "WHETHER THE CONSTITUTIONAL RIGHT OF JURY TRIAL IN CIVIL ACTION SHALL BE SET AT NAUGHT BY TECHNICALITIES AND HARMLESS ERROR."

There is no invasion of the constitutional right of trial by jury. The case has been remanded to be retried by a jury. The Circuit Court of Appeals found that the trial judge erred in rejecting certain evidence which the jury should have had before it and in admitting certain evidence which was incompetent and should not have gone before the jury and that this respondent was seriously prejudiced by such rulings of the trial court. This respondent, equally with petitioners, has the constitutional right to a trial by jury but, in such trial, all evidence properly admissible must be placed before the jury and inadmissible evidence must be excluded. If the three judges of the Court of Appeals differ with the trial judge and find that he committed serious and prejudicial error in the admission and rejection of evidence, it cannot with reason be said that their action invades the constitutional right of trial by jury. One of the functions of the Court of Appeals is to determine whether the trial by jury has been properly conducted. If the appellate court finds that the trial judge erred and respondent was prejudiced by such errors, it was the duty and the function of the appellate court to set the judgment aside. It

is the province of the Court and not the jury to rule on evidence and the Court's error is not protected by the Constitution's guarantee of trial by jury.

Third: "WHETHER THE FUNDAMENTAL PRINCIPLES AND RULES OF EVIDENCE AND THE DISCRETION OF THE TRIAL JUDGE, WISELY EXERCISED, IN THE EXCLUSION AND THE ADMISSION OF EVIDENCE SHALL BE OBLITERATED."

The Circuit Court of Appeals has found that the trial judge committed error; that certain evidence should have been admitted and other evidence excluded and that serious prejudice resulted from these rulings. The trial judge had no discretion to be exercised, wisely or otherwise, in excluding competent evidence and admitting incompetent evidence. The Court of Appeals has not obliterated the principles and rules of evidence nor has it interfered with the discretion which the trial judge properly and lawfully had. The trial judge is not the final arbiter and his erroneous rulings in material respects cannot stand.

Fourth: "WHETHER THE ACT OF FEBRUARY 26, 1919, SHALL BE CONSTRUED MERELY AS DIRECTORY AND DISCRETIONARY AND NOT AT ALL AS MANDATORY."

The Circuit Court of Appeals has not departed from the requirements of the act; it has not reversed the judgment of the District Court for technical errors nor for defects which do not affect the substantial rights of the respondent. It shows in its opinion that the errors committed by the trial judge were grave and substantial and

that respondent has been seriously prejudiced. When the Circuit Court of Appeals reaches such a conclusion, it is obviously acting within the statute and not beyond it.

This case presents no feature which would warrant this Court in issuing the writ. The petition simply charges that the Circuit Court of Appeals erred in applying rules of evidence. If this case were here on writ of error, the judgment of the Circuit Court of Appeals should be affirmed on the face of the papers. The application for certiorari should be denied on the face of the petition.

Respectfully submitted,

H. GENERES DUFOUR,
DELOS R. JOHNSON,
B. M. MILLER,
Of Counsel for Respondent.

FEB 28 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 252

MRS. L. E. WILLIAMS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR SON, JOHN EARL WILLIAMS,

Petitioner,

versus

GREAT SOUTHERN LUMBER COMPANY,

Respondent.

Original Brief of Great Southern Lumber Company, Respondent.

H. GENERES DUFOUR,
B. M. MILLER,
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Attorneys for Respondent.

February, 1928.

MONTGOMERY-ANDREE PRINTING CO. INC., 307 CHARTRES, N. O.

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IN THE

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OCTOBER TERM, 1927.

No. 252

MRS. L. E. WILLIAMS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR SON, JOHN EARL WILLIAMS,

Petitioner,

versus

GREAT SOUTHERN LUMBER COMPANY,

Respondent.

Original Brief of Great Southern Lumber Company, Respondent.

STATEMENT OF THE CASE.

This is a suit by Mrs. L. E. Williams, individually and as tutrix of her minor child, for damages resulting from the killing of her husband, father of the child, on November 22, 1919. The original petition, filed November 6, 1920, set out that the deceased was killed by a "band of gunmen" who were maintained by the

Company, and that in killing Williams they acted within the scope of their authority as agents and employees of the Company. An exception of no cause of action was filed and subsequently maintained by the Court with leave to amend. See discussion, post page 64). An amended and supplemental petition was then filed in which it was charged that the deceased met his death at the hands of these gunmen who acted in execution of a conspiracy among the Company, its employees and strangers to kill Williams or that Williams was killed by these gunmen acting within the scope of their authority. A second supplemental petition was filed making five certain alleged employees co-defendants, who were citizens of Louisiana. It turned out that four of these five were local merchants. These five co-defendants were dismissed on plaintiff's motion when a question of jurisdiction arose. The suit was filed November 6, 1920. The trial in the District Court began on April 20, 1925, and a verdict was rendered in favor of plaintiff May 5, 1925, for $50,000.00. On motion for a new trial the District Court ordered a remittitur to $30,000.00, which was thereafter entered by plaintiff. A writ of error was taken from the Circuit Court of Appeals for the Fifth Circuit. That Court reversed the verdict and judgment and ordered a new trial. *(17 Fed. Rep. (2d) 468).* Application was made to this Court for a writ of *certiorari.* The application was granted and the case is now before the Court for review.

In the opinion of the Circuit Court of Appeals *(R-1084, Fed. Rep. (2), Vol. 17, 468)*, Judge Grubb,

as the organ of the Court, summarizes the facts as follows:

> "This was an action for damages, brought in the District Court by the defendant in error (as plaintiff) against the plaintiff in error (as defendant), arising out of the alleged unlawful killing of the husband of the plaintiff and the father of her minor child, in whose behalf she sued as tutrix. The deceased husband and father was killed on his own premises by a policeman of the City of Bogalusa, on November 22, 1919, under the following circumstances:
>
> "The defendant had been for many years operating a sawmill in Bogalusa, and employed in it some 2,500 men, white and black. Friction had arisen between the defendant and its employees some months before the deceased was killed. There was no strike in force, but a shut-down, due to an accident to defendant's machinery, had thrown the defendant's employees, except its millwrights, out of work, and they had been idle for some weeks before deceased was killed. During this period, troubles had arisen between the workmen of defendant and itself and with the municipal authorities of Bogalusa. On one occasion, prospective employees of the defendant, arriving at the railroad station at Bogalusa, had been forced by laborers to re-enter the train from which they had debarked and to leave Bogalusa. On another occasion, certain laborers had been put in

jail, and a crowd of their sympathizers had threatened to effect a jail delivery. There had also been disorders at meetings of the Bogalusa city commission at various times.

"Due to these occurrences additional paid policemen had been employed by the city, and a voluntary citizen police force had been organized and sworn in by the city, and had been actually called into service upon one or more occasions before the killing of the deceased. At the defendant's sawmill, there was a whistle used during the operation of the mill, to notify its employees when quitting time had arrived. The commissioner of public safety of Bogalusa had arranged with the superintendent of the defendant that, in case of disorder and the need to call upon the voluntary police to quell it, the whistle should be sounded to notify the voluntary police to assemble at the city hall. The signal had been used for that purpose by the defendant's superintendent at the request of the municipal officers before the killing of deceased. On the day before the deceased was killed, a warrant for one Dacus, a negro, had been issued by the city on a charge that he was a dangerous and suspicious person. Dacus was not found at his home on the day the warrant issued. On the morning of the succeeding day, Dacus, in company with two labor sympathizers, both armed with shotguns, and with Dacus between them, walked down Columbia Street in Bogalusa in a public way,

and were seen to enter the premises of Lem Williams, the deceased, who was the president of Trades Council.

"The chief of police of Bogalusa was notified by a policeman and by others that Dacus had been seen on the street in company with the labor leaders and had gone upon the premises of the deceased, Williams, with them. The chief of police then consulted with the commissioner of safety with reference to the situation, and the expediency of summoning the special and voluntary police to help execute the warrant on Dacus, and also warrants which were then issued for the two labor leaders. It was decided that it would be best to summon special officers to make the arrests. The special officers were to be summoned by the mill whistle, and word was sent to the superintendent of the mill to that effect. The superintendent caused the whistle to be blown to notify the special officers to report at the City Hall. Upon their assembling there, together with one Magee, who was a paid officer of the city to whom the warrants were given for execution, they went in company with the commissioner of safety to the premises of the deceased for the purpose of making the arrest. There were about 75 men in the party.

"The evidence was conflicting as to how many were employees of defendant. The superintendent of the defendant was there, but whether he was armed or not was in dis-

> pute. The facts as to what transpired after the party had arrived, and while the warrants were being executed, were in conflict. The witnesses of the plaintiff testified that the deceased and others were killed by members of the party without warning or provocation. The witnesses of the defendant testified that the deceased, Williams, was notified that the purpose of the visit was to serve warrants on Dacus and the two labor leaders, and that deceased was called upon to put down a pistol, which he had, and permit the arrest to be made, and that he refused to do so; that a shot was fired from the inside of the office, at the door of which the deceased was standing; and that it was then only that the arresting party fired, killing the deceased and others."

The following facts, supplementing the statement of the case by the Circuit Court of Appeals, appear undisputed on the record:

The City of Bogalusa, at the period in question, had a population of about 16,000 people, of whom 2500 were employed in the operation of the plant of Great Southern Lumber Company, sixty per cent of which employees were colored. (R. 954).

There were other industries in Bogalusa employing large numbers of men, among them Bogalusa Paper Company, Baer Hardwood Company, Colonial Creosoting Company and General Box Company. Bogalusa was also the headquarters of New Orleans Great

Northern Railroad Company, where its shops employing a large number of men were located.

In the year 1919, W. H. Sullivan was Vice-President and General Manager of Great Southern Lumber Company and its chief officer in Bogalusa; he was also the Mayor of the City of Bogalusa and had been Mayor since the organization of the city. J. H. Cassidy was Assistant General Manager of the Company. E. R. Cassidy, his brother, was City Commissioner of Finance and Acting Mayor in the absence of the Mayor; he was the Claim Agent of the New Orleans Great Northern Railroad Company. J. B. Lindsley was Commissioner of Public Safety; he was President of the Washington Bank & Trust Company, an independent bank and a competitor in business of the bank in which the Great Southern Lumber Company was the largest stockholder. J. P. Starns was Commissioner of Education; he was engaged in the retail drug business. Joseph Ragan was Commissioner of Improvements; he was a labor leader. None of these officials, with the exception of the Mayor, had ever been employed by the Great Southern Lumber Company, and it appears that the commissioners were elected on a ticket which was in opposition to the ticket supported by the officials of the Great Southern Lumber Company at the general election.

L. E. Williams (called "Lem" in the record), plaintiff's husband, was the president of the local labor union; he operated a garage and repair shop in the eastern part of Bogalusa, known as Columbia Road.

Some time prior to July, 1919, Lem Williams and one Donnelly, a labor organizer, called on Mr. Sulli-

van on two or more occasions and informed him of their desire to organize the company's labor (R. 952, etc.), meaning that the company should make a contract with the labor unions whereby the unions would name the persons to be employed by the company and, through the officers and committees of the union, settle grievances between the company and its employees; in other words, that the company's plant should be operated as a "closed shop" (R. 958). A committee of the union also called on Mr. Sullivan and made similar demands. (R. 959).

Mr. Sullivan replied that the company would not consent to a "closed shop," but would continue to operate as an "open shop" and would employ its labor without discrimination against any man because of his connection with the union, his color or his faith; and he had notices posted in the company's plant to that effect (R. 959); testimony of Cassidy (R. 991).

Notwithstanding these discussions, which appeared to be entirely friendly, the evidence shows that no friction, as the Circuit Court of Appeals calls it, had arisen or existed between the company and its employees until shortly after the company's mill was shut down, following a serious accident to the machinery. The conditions of idleness, brought on by the shut-down, led to the widespread lawlessness which began immediately after the shut-down and culminated in the shooting which is the basis of this action.

The following excerpt from the testimony of Commissioner Cassidy, Acting Mayor of the City of Bogalusa in October and November, 1919, describes the conditions existing at that time (R. 899):

Q. In the absence of the Mayor of the City of Bogalusa, who is the acting mayor of the City?

A. The Commissioner of Accounts and Finance.

Q. Were you acting mayor of the city of Bogalusa at any time during October and November, 1919?

A. Yes, sir, all through October and the early part of November.

Q. What were the conditions that made you acting mayor?

A. Mr. Sullivan had gone north.

Q. Are you familiar with the conditions that existed in Bogalusa during the months of October and November, 1919?

A. I am yes, sir.

Q. Will you state what these conditions were, whether they were normal or abnormal, and in what respect?

A. They were very abnormal.

Q. In what respect were they abnormal?

A. A lot of men were not working themselves, and they tried to prevent other men from doing any work, and the town was in a turmoil.

Q. Were the meetings of the Commission Council peaceful and orderly?

A. They were not, no, sir.

Q. What conditions operated to make them not peaceful and orderly?

A. Well at every meeting of the Commission Council there was a crowd of boisterous men that came to make demands as to what they should do or should not do, who they should appoint, how the town should be run.

Q. Can you give us any instances of those gatherings, and what demands they were seeking to enforce through the Commission Council?

A. Yes, sir. We had during the month of October, we had meetings of the Commission Council two or three times a week, due to the abnormal conditions that then existed, and the leaders of the crowd, headed by Mr. Lem Williams, came there and made demands that the chief of police be recalled, certain men working for the city be turned out of their jobs, and men whom he and his crowd would select should be appointed in their stead.

Q. Do you recall whether the light and water system was operating continuously at that period?

A. It was not.

Q. When was the interruption, and what was it due to?

A. I don't recall the exact date, but I think it was some time in the early part of October, the Police Department reported to

me that the men working on the night shift of the Great Southern Lumber Company had been intimidated at the gate—

Objection: Mr. Higgins:

Now you are testifying what somebody told you; you were not present.

The witness:

I was not present.

Mr. Higgins:

Then I object.

Mr. Dufour:

It was reported to him, as mayor of the town, of a disorder that existed.

Mr. Higgins:

He should not be permitted to go into details.

The Court:

I think he had better not testify to any specific act; just the reports, and the result.

A. (Witness continuing). The result was that the town was without lights and water, and I called a special meeting of the commission council to devise ways and means to try to keep them going. At this meeting, Mr. Williams came with his crowd, and I appealed to him as a man, told him the condition that then existed in the city and would exist, and if that were allowed to go on, the children

and women would be suffering in a few days. He said that the only way he would consent to remedy the condition would be for him to select the men that were to go in there and operate this plant, the water and lights, and if the Great Southern Lumber Company was not willing to agree to that, they would all suffer together.

Q. Were any demands made with respect to the police force?

A. Absolutely. They first told us we had to get rid of the chief—that was one of their stipulations—otherwise they would recall the mayor and the commissioners, and if it was necessary to appoint additional police, they demanded that they have the right to select these men.

Q. You mean additional paid police?

A. Yes, sir, additional paid police.

Q. They wanted to have the privilege of selecting those men?

A. They did, yes, sir.

Q. What were the conditions that existed around the depot at that time of the arrival of trains?

A. The condition was, all men coming in there, millwrights to repair the mill that had broken down, they were met at the station by these men, who ordered them back on the train, threatened them with bodily harm if they didn't go back, compelled them to go back on the train and to leave the city.

Q. As acting mayor of the city, did you know of any armed men marching the streets?

A. I did. My office was right diagonally across from the depot. I saw the mob down there, and I went down and saw men with guns on their shoulders, and I took some of them up personally, took those men up to my office and remonstrated with them, and asked them for the sake of the women and children to be calm.

Q. Were Williams and his men satisfied with the personel by which you were operating your pumping stations and your sewerage system?

A. They were not. They said that the men down there were unsatisfactory to them, and they demanded the right to have them taken out and men put in whom they selected.

Q. Were these meetings peaceful and orderly meetings in which citizens—

A. They were not. The first meetings we had in October were absolutely dominated by these men; the Commission Council was at their mercy; we had to do pretty much as they told us to do. Later on, the citizens of the town, seeing the chaotic condition which the town had drifted into voluntarily came to me and offered their services.

Q. As special police?

A. Well, not as special police at first. I would like to go into details and explain just how that came about.

Q. Go ahead.

A. There was one meeting we had of the Commission Council—conditions just got so unbearable, I got up and told them personally I didn't propose to stand for it any longer, they were threatening me with recall and threatening the mayor with recall, and the prominent business men of the town approved of the stand I had taken, and the next day or the day after a committee came to my house and told me the business men of the town had banded themselves together to assist the city authorities in maintaining law and order during that troubled time. I asked them who comprised this Self Preservation and Loyalty League, as they called themselves, and they invited me to come down to the City Hall and see, and I went down there and I found lawyers and bankers and men engaged in commercial business, and they told me those were the men that had put themselves at the disposal of the city government. Someone suggested that they be sworn as special police, and I consented to that provided they would work under the direction and supervision of the chief of police, and they all agreed to that. They were sworn in verbally, and in order to have a record of the names of those who were special police, I asked our City Clerk, who was also a Notary Public to have each man sign an affidavit—I mean an oath of office.

Q. Did you take any advice as to what authority you had to do that?

A. I did. Conditions were getting so bad, I feared there was going to be bloodshed. First I wrote to the Governor, who was then Governor Pleasant, that the city authorities were unable to cope with the situation that then existed, and asked if possible to have some troops sent over there to maintain law and order, and I received a communication from his secretary, stating that the Governor was out of the state, and that as soon as he came back the matter would be brought to his attention. I waited a week or so and received no reply. I then went down to the City Attorney, who was Mr. Talley then and also the present City Attorney, and sought his advice, and he recommended that I appoint a number of additional police. I wanted to be absolutely sure of my ground, and I then went to the District Judge—

Q. Who was he?

A. The Honorable Prentiss Carter—he is still judge—and I explained the situation in Bogalusa to him, told him I had in mind appointing a number of additional police, told him that had been recommended by the City Attorney, and asked him if I had a legal right to do so, and he said yes, appoint as many as were necessary to maintain law and order, and also I went to the City Judge, who was Judge Ott, and he is the present City Judge, and he gave me the same advice, and

after I got that advice, I swore those men in as special police.

Q. And your purpose in swearing in those special police was to maintain law and order in the City of Bogalusa?

A. It was.

Q. Of which you were at that time the acting head?

A. Yes.

Q. You say that Williams and his associates would come there in crowds?

A. They did.

Q. To your meetings?

A. Yes.

Q. How many men would constitute those crowds?

A. I would estimate about three or four hundred.

Q. Were they an orderly crowd?

A. Not very, no, sir.

Q. What do you mean by "not very?"

A. Well, one fellow would get up and make a rip-roaring speech, to use a slang expression, and they would all applaud and stamp their feet, and it would be may be five or ten minutes before I could get order again, and then somebody else would get up and make a speech and tell what they were going to do with the different city officials, the Police Department and the mayor.

Q. Were any of the men at those meetings armed?

A. A number of the men had guns in their hip pockets, yes.

Q. Was that the exception or the rule?

A. It was the rule. I don't say they all had them, but I noticed a number of them did.

Q. Did you ever work for the Great Southern Lumber Company?

A. Never did, no, sir.

The regular police force of Bogalusa consisted of a chief and six men (R. 528), some on night duty.

J. P. Starns, Commissioner of Education and a member of the Commission Council of the City of Bogalusa, testified that the people "lived in hell for about 30 or 60 days; it was really dangerous for us to be out"; that armed men paraded through the streets and went to the colored quarters to compel workmen to join the Union; that any men who looked like workmen were not permitted to get off the trains; that Lem Williams and several hundred of his associates attended meetings of the Commission Council and so conducted themselves that it was impossible to carry on the meeting; that these men demanded that the lights and water be shut off and that Union men alone be permitted to run the water and light plant; that the police force be dismissed and be replaced by men named by Williams and his associates; that the police be required to report to Williams the name of any person arrested so that he might decide whether such person

should remain under arrest, and that unless their demands were complied with, the Mayor and Commission Council would be recalled. (R. 886).

H. J. Cowgill, a witness on behalf of defendant, testified (R. 789) that he was a contractor in the City of Bogalusa; that he had resided there for sixteen years; that he was not connected with the Great Southern Lumber Company; that everything was upset in Bogalusa and there was no law and order; that the Commission Council could not function, the City Government was at a standstill, and lights and water were out; that because of these conditions, he and other business and professional men of the town organized themselves into the Self Preservation and Loyalty League, of which he was chairman; that no Union men and no officials or employees of the Great Southern Lumber Company were permitted to join; that they trained their members as special officers so as to support and assist the Police Department; that their members were sworn in as special police officers and that he, as a member of this organization, responded to both calls for the assembly of the special officers, namely, the call when Williams and his associates threatened to storm the jail and the call when the special officers, under command of Commisisoner Lindsley, went to Williams' place to arrest Bouchillon, O'Rourke and Dacus.

The names and occupations of the many business and professional men composing the League appear throughout the record.

J. H. Cassidy, Assistant General Manager of the Company, testified (R. 990) that he was present on

various occasions in the month of October at the power plant of the company which furnished water and light to the City of Bogalusa, and which, during the period of the shut-down, was operated solely for this public purpose, and that Williams and his associates would congregate at the gates of the power plant "running the men off and stopping them from going into the power house at nights" (R. 995), and that on one of these occasions Williams came up with a crowd of thirty or forty of his associates and prevented the workmen from going into the power house, with the result that the city was without light and water; that, on this occasion, one of the workmen was shot and that, when the operations of the power and light plant were resumed after this temporary suspension, the company was compelled to permanently install the workmen in the power house and maintain them there continuously, so as to avoid the interruptions brought about by the interference of Williams and his associates. This testimony is corroborated by the testimony of several other witnesses.

There was a whistle on the company's mill, which, for a long time, had been used by the City Fire Department, by arrangement with the company, as a fire alarm. Lindsley, Commissioner of Public Safety, and Chief of Police Magee arranged with J. H. Cassidy, Assistant General Manager of the Company, to have this whistle blown as a signal for the assembling at the City Hall of the special police—members of the Self Preservation and Loyalty League, whenever their services were required by the Police Department. (R. 583, 993, 546).

This signal was given only on two occasions, on the date of the shooting and on another occasion several weeks prior thereto, when an armed crowd of union men and their sympathizers had assembled at the jail in an attempt to make a delivery of some of their friends who had been incarcerated. (R. 545, 583, 576).

These men were arrested and incarcerated under the following circumstances. It will be recalled, *supra*, page 12, that millwrights brought to Bogalusa to repair the breakdown in the mill, were forced by Williams and his associates to reboard the train and leave the city. A second attempt was made to bring millwrights to repair the mill. These millwrights were met at the train by a mob of armed men, led by Williams, and a disturbance ensued.

Some of the disturbers, including Williams, were arrested by the police and were placed in jail. Shortly thereafter, an armed mob congregated before the jail and demanded the release of the prisoners, threatening to forcibly effect their purpose if their demands were not complied with. (R. 584). The Chief of Police, being unable to cope with the situation with his regular force then on duty, caused the whistle to be blown as a signal for the summoning of the special police. (R. 545-546). The special officers responded to the signal in numbers and the disturbance was quelled without bloodshed. The prisoners were not released; they were tried and convicted and Williams and others paid their fines.

The Trial Court excluded the evidence of plaintiff's witness, Patrolman Flournoy, tending to show

that on one occasion several weeks before the shooting, when Flournoy had arrested one Tom Ezell, a union man, Lem Williams interfered and challenged the authority of the officer, threatened to burn the jail and do bodily injury to the officer if the prisoner was not released. (R. 506). Exception was duly noted, bill of exception reserved and taken (R. 1064) and error assigned. (R. 127).

There were no disturbances during the several weeks intervening between the date of this attempted jail delivery and the date of the shooting, November 22, 1919. On November 21, 1919, H. H. Wilcox, a merchant and property owner in Bogalusa, swore out a warrant for the arrest of one Sol Dacus, a colored laborer, as being a dangerous and suspicious character, under an appropriate city ordinance. A warrant for his arrest was issued and delivered by the Clerk of Court to the Police Department. (R. 153). Efforts were made to apprehend Dacus on the night of November 21st, but he could not be found. The Chief of Police instructed Patrolman Flournoy, a regular police officer, to arrest Dacus on sight.

On the morning of November 22nd, the day of the shooting, between eleven and twelve o'clock, Patrolman Flournoy saw Dacus on Columbia Road, the principal business street in Bogalusa, and a point distant from the Company's property. He was accompanied by two union men, Bouchillon and O'Rourke. The three men were walking on the sidewalk—three abreast—Dacus in the middle. Bouchillon and O'Rourke were armed with shot guns and were using loud, defiant, threatening and obscene language, directed at Patrol-

man Flournoy, as they passed him, and likewise directed at storekeepers and others as they passed on their march. Patrolman Flournoy was not permitted to say what these men said. Outside of the presence of the jury, the defendant spread on the record the nature and character of the testimony which it proposed to elicit from the witness, namely, the circumstances attending this march and the nature and character of the threats. It was there shown that the witness would say that Bouchillon and O'Rourke, in loud and audible voice proclaimed, as they passed Patrolman Flournoy and others in their march: "We would like to see any white s. b. who will come and take this man," or "We would like to see the eyes of any white s. b. who will touch this man."

Patrolman Flournoy, although under instructions from the Chief of Police to arrest Dacus on sight, refrained from doing so fearing for his life, as he stated. (R. 501). He waited until he saw the three men go into Williams' yard, whereupon he immediately telephoned police headquarters and advised the Chief of Police of what had happened. Citizens, who saw and heard the incident, likewise reported it by telephone to the Chief of Police.

The Trial Judge refused to permit Patrolman Flournoy and the Chief of Police to testify as to these facts. (R. 500, 529). Exceptions were duly taken and error assigned. (R. 1052, 1064, 1069, 123, 133, 134).

(It was useless to call other witnesses on this point in face of the Trial Judge's ruling).

Upon receipt of these reports the Chief of Police instructed his lieutenant to swear out warrants in the City Court against Bouchillon and O'Rourke, and this was done. The Chief of Police called up Commissioner of Public Safety Lindsley, advised him of the occurrence, and requested him to come immediately to police headquarters. The Commissioner repaired to police headquarters and, after discussing the matter with the Chief, it was decided that, in view of recent previous occurrences and with a desire to avoid trouble, it would be best to have these parties arrested by the Commissioner of Public Safety and the special officers, rather than to have the warrants served by the regular police force. (Testimony of Chief Magee, R. 535-541; testimony of Commissioner Lindsley, R. 585, 583).

The Chief of Police was not permitted to testify before the jury as to why he considered this course advisable and what reports he had received from Patrolman Flournoy and certain citizens concerning the acts of Bouchillon, O'Rourke and Dacus.

The Commissioner of Public Safety and the Chief of Police directed the whistle to be blown at the company's mill as a signal for the assembling at police headquarters of the special police officers. (R. 549-582).

This whistle was blown in accordance with an understanding previously had between the police authorities and the company that the whistle might be blown for the purpose of assembling the special police as occasion might require. (R. 545, 576, 583).

A number of special police assembled at the City Hall and, under the command of Commissioner of Public Safety Lindsley and with one regular police officer, W. C. Magee, who had the warrants, proceeded in automobiles to Williams' place. The force consisted of about twenty men, according to the testimony of Commissioner Lindsley, of whom Magee, Jules LeBlanc and six or seven others were directed by the Commissioner to make the arrest after the squad had arrived on the scene. (R. 585).

There is considerable conflict in the testimony between plaintiff's witnesses and defendant's witnesses and even as among plaintiff's witnesses as to what happened after the Commissioner and his officers arrived on the scene. Some of plaintiff's witnesses testified that the officers came into the yard, walked up to the office where Williams and his associates were, called Williams out and immediately shot him. The defendant's witnesses, on the other hand, testified that Williams came to the door of the office with a pistol in his hand, that Officer Magee told him they had warrants for the arrest of Bouchillon, O'Rourke and Dacus, and several times requested Williams to put down his pistol; that, thereupon, a shot was fired from the office in which Williams and his associates were congregated, wounding Special Officer Jules LeBlanc, and that, thereupon, the police officers returned the fire, killing Williams and others.

It is stated by some of plaintiff's witnesses, and by the Circuit Court of Appeals in its opinion, that the posse led by the Commissioner of Public Safety to Williams' place consisted of about 75 men. Doubtless

there was that number of people, or more, in and about the premises and the streets at the time of the shooting, or immediately thereafter, attracted by the arrival of prominent citizens armed and riding in automobiles, and by the shooting, but the testimony of the Commissioner, the Chief of Police, Patrolman Magee, and the members of the posse, all of whom were in the best position to know the facts, is to the effect that the posse consisted of between 15 and 20 men. (R. 551, 588, 635, 661).

The number of men in the posse may not be of any importance except to show that it was not a mob of 75, or more, as asserted by plaintiff, but a comparatively small body of citizens and officers who went on a mission that they thought would tend to preserve the peace and prevent armed resistance to the enforcement of legal process.

The evidence conclusively shows that Williams and his associates, including Bouchillon and O'Rourke, who had congregated in the small one-room office, were armed with shotguns, rifles and pistols and had considerable ammunition. (R. 774, 503, 554, 637, 710, 841, 845, 849).

The Circuit Court of Appeals reversed the verdict and judgment on the following grounds:

(1) That the Trial Court erred in excluding evidence to show that Bouchillon and O'Rourke were engaged in the commission of a crime and incitement to riot and that such testimony was material and its exclusion constituted prejudicial error.

(2) That the Trial Court erred in admitting testimony that one Carson, an alleged member of the posse, had stated to Mrs. Williams, after the shooting, that the posse had come to Williams' place for the purpose of killing him and that the admission of such testimony constituted prejudicial error.

The Circuit Court of Appeals, in its opinion, said that the District Judge denied the request of defendant for a directed verdict; that, as the evidence at a subsequent trial might differ from that presented in this record, it was unnecessary for the Court to pass upon its sufficiency to establish either or both of the grounds of liability relied upon by plaintiff to connect defendant with the killing, but that the Court did not find that the present record contained any evidence of a conspiracy between the defendant, through its agents and employees, and strangers to kill Williams or that any employee, who may have participated in the killing, was acting within the scope of his authority, express or implied. (Opinion, page 471, Fed. Rep., Vol. 17 [2d]).

ARGUMENT.

We will discuss the question arising on the record, based upon appropriate bills of exception and assignment of error, under the following heads:

(1) The District Court erred, as found by the Circuit Court of Appeals, in excluding the evidence relating to the threats and incitement of Bouchillon, O'Rourke and Dacus on their armed march on Columbia Road;

(2) The District Court erred, as found by the Circuit Court of Appeals, in admitting the statement alleged to have been made by Carson after the shooting;

(3) That the District Court erred in excluding the testimony as to Williams' attempt to interfere with the police officer in arresting Tom Ezell—the Circuit Court of Appeals having failed to take cognizance of this assigned error;

(4) That defendant's motion to direct a verdict in its favor on the whole record made after the conclusion of all testimony should have been granted, and the District Court erred in not granting same;

(5) That both the District Court and the Circuit Court of Appeals erred in overruling and not sustaining defendant's exceptions of no cause of action and prescription.

FIRST POINT.

The District Court Erred, As Found by the Circuit Court of Appeals, in Excluding the Evidence Relating to the Threats and Incitement of Bouchillon, O'Rourke and Dacus in Their Armed March in Columbia Road.

The petition and supplemental petition, together, assert that Williams was killed as the result of a conspiracy entered into between the company, its officers, servants and strangers, to kill Williams, and that he was killed in pursuance of that conspiracy and, furthermore, that Williams was killed by the agents and

servants of the Great Southern Lumber Company acting within the scope of their authority.

The defendant denied these allegations and set up that Williams was killed by peace officers of the City of Bogalusa, commanded by its Commissioner of Public Safety, in resisting this posse in the execution of warrants that had been issued for the arrest of Dacus, Bouchillon and O'Rourke, and that the company had no part in the issuance of these warrants or their execution.

The record shows that a condition of lawlessness had existed in Bogalusa during the latter part of the month of September and during the month of October; that Williams and his associates had interfered with and intimidated the workmen operating the power plant which furnished light and water to the city and its inhabitants; that millwrights brought to repair the damage to the company's property had been forced to leave the city on one occasion and had been unsuccessfully interfered with on another occasion; that an attempt had been made by the union men to effect a jail delivery of prisoners who had been arrested for interfering with these millwrights; that an incipient riot had ensued which was quelled without bloodshed by the special police; that Williams and his men had interfered with the official meeting of the Commission Council; that they had threatened and defied the public authorities; that armed men were parading the streets and creating disturbances; that conditions had become so aggravated that the citizens of the town had organized a Self-Preservation and Loyalty League, had tendered their services to the municipal authorities for

the enforcement of law and order, and that these services had been accepted by the Acting Mayor, after taking advice from the District Judge, the City Judge and the City Attorney, and they were only sworn.

The record further shows that conditions had quieted down in Bogalusa for several weeks prior to the Dacus-Bouchillon-O'Rourke incident and that, after the attempted jail delivery and the suppression of this attempt by the authorities, supported by the special police, no disturbance had occurred up to the incidents hereinabove set forth leading to the shooting.

A warrant had been issued for the arrest of Dacus on a minor offense and the regular policemen were instructed to arrest Dacus on sight after attempt had been made to locate him. On the morning of November 22nd, Bogalusa was at peace. There was no disturbance and had been none for several weeks. The Self-Preservation and Loyalty League, composed of the leading citizens of the community, had undoubtedly effected the purpose of its organization to maintain law and order.

Suddenly, the public authorities were challenged and the public peace broken by Dacus appearing on the principal street, walking between Bouchillon and O'Rourke, two union men, both armed with shotguns, who were engaged in defying the public authorities by proclaiming in a loud and audible voice that they would like to see the .... white man who would try to touch Dacus. These remarks were directed to Patrolman Flournoy, as well as to others. Patrolman

Flournoy, although instructed to arrest Dacus, refrained from doing so fearing, as he stated, that his life was at stake. He permitted these violators of the public peace and these inciters to riot to challenge his authority and the authority of the law. He watched to see where these men went and when he found that they had gone into Williams' place, he reported the incident to his Chief. Citizens who had heard these remarks likewise reported the incident to the Chief of Police. Excitement obviously followed from such a performance on the main street of a small town. All testimony as to the nature of these threats and the character of this unlawful procession were kept from the jury. Likewise, there was kept from the jury the testimony of the Chief of Police as to why they felt the situation so serious as to warrant the summoning of special officers to assist the authorities in effecting the arrest. On this material point, the Circuit Court of Appeals, in its opinion, said:

> "An important issue on the trial was whether the party, a member of which killed deceased, went to his premises to enforce the law as peace officers by the arrest of offenders, whom they believed were there, and against whom warrants were outstanding and in their possession, or whether they went there at the instance of defendant or its agents to unlawfully kill deceased to get rid of him. The defense of the defendant was predicated on a showing that the raid was in the interest of law enforcement, and the party or posse legally bent on serving the

warrants with no ulterior motive. Clearly in aid of this defense, defendant was entitled to show that an occasion had arisen and still existed calling for the enforcement of the law by the serving of the warrants for Bouchillon, O'Rourke, and Dacus, and the need for a number of officers, instead of a single one, to safely accomplish the arrest. If there had been a defiance of the law shortly before by Bouchillon and O'Rourke by threatening to protect Dacus by violence against arrest, this was a fact tending to show an occasion requiring the exercise of force to uphold the law and by a posse rather than by a single officer.

"The trial judge permitted evidence tending to show that Bouchillon and O'Rourke paraded Columbia street, armed and with Dacus between them; but the court refused to permit witnesses to testify to threats asserted to have been made by Bouchillon and O'Rourke to prevent Dacus' apprehension by violence, if necessary, upon the ground that it was hearsay and immaterial. The issue was whether or not such threats had been in fact made, and the testimony of witnesses, who heard them made, is not hearsay. The making of the threatening statements, and not the truth of what had been said by the makers, was the inquiry. Permitting the defendant to show the parading of the street, while denying it the privilege of showing the unlawful character of the parade by the ac-

companying declarations of the paraders, was less than half a loaf. Plaintiff contended, and the District Judge charged, that Bouchillon and O'Rourke had the right to bear arms in the public street. The pertinent fact, therefore, was not that they had borne arms, but their purpose in doing so. Crime or innocence was to be determined by their purpose. If they had no intent to defy the law and protect Dacus from it by violence, no crime was committed and no occasion for a posse to make the arrest existed. If their purpose was to intimidate the police by threats of violent protection of Dacus against arrest, then they were committing a crime and one which could only safely be met by the summoning of a posse. A posse was summoned, a member of it killed deceased, and defendant was sought to be held liable for his death upon the theory that the party was not a posse, but an aggregation of strong-armed gunmen, assembled by defendant to unlawfully remove deceased. The relevancy of any declaration of Bouchillon and O'Rourke that might serve to illustrate the character of their march with Dacus is clear, for it was the criminal character and not the march itself that would justify the issuing of warrants and the raising of a posse to execute them. The evidence rejected was neither hearsay or irrelevant. Its rejection was error, and the injury resulting to the defendant serious enough to require a reversal of the judgment."

The jury did not know of the threats and menacing attitude of these three men and of their declared purpose to resist arrest. The jury did not know that the Chief of Police and the Commissioner of Public Safety had information which indicated that resistance to arrest might be made and that, in order to execute the warrants and preserve order, it was necessary and advisable, in their judgment, to send a body of sworn and armed officers on this mission. The jury probably inferred from the testimony which it heard, that there was no occasion for any such extreme measures; that the constituted authorities were able, or should have been able, to make an ordinary arrest and, therefore, the jury probably indulged in the conjecture that the sending of this posse to Williams' place was not justified by the evidence before them.

The materiality of the evidence, which was excluded, appears so manifest that it is difficult to conceive of any basis upon which it could have been excluded. This evidence shows the real and logical motive for and explanation of the course adopted by the Commissioner of Public Safety and the Chief of Police who, in an effort to perform their duties, adopted what they thought to be the best means of insuring a peaceful outcome. It would ordinarily be supposed that, when a number of officers and leading citizens, well known to Williams and his associates, entered Williams' yard to effect the arrest, their authority would be respected and a peaceful issue result. This outburst, after several weeks' calm, required some

rational explanation. This evidence would have furnished a full and rational explanation of the incident and should have negatived and dispelled any theory that this unfortunate occurrence resulted from any conspiracy to kill Williams, or from any act done by the Great Southern Lumber Company or its agents, within the scope of their authority.

It is a vital point in the case: Whether Williams was killed by the constituted authorities in the enforcement of law and order or by the defendant; whether the posse which did the shooting was organized by the constituted authorities to meet an emergency or as a pretext by the defendant to make away with Williams. It is, in fact, the very heart of the case.

The prejudicial effect of the exclusion of this evidence is aggravated by the charge of the Trial Judge, wherein he states (R. 78):

> "The law does not prohibit a citizen from carrying arms publicly on the street and, in doing so, he commits no offense and is entitled to freedom from arrest until he commits some offense."

A jury would obviously conclude from this charge that Bouchillon, O'Rourke and Dacus were acting within their constitutional and legal rights and that the action of the public authorities and the posse was an invasion of these rights, whereas, if the jury had been permitted to know the circumstances attending

the incident and the nature and extent of the provocative acts, it should have reached the conclusion that the shooting of Williams was the outcome of these provocative acts and that the Great Southern Lumber Company, its officers and agents, were in no wise responsible therefor.

Petitioner terms this a technical and insubstantial error and says that a new trial should not lightly be granted, especially as the trial lasted "more than four weeks." The error is not technical or insubstantial; it is material and fatal, as found by the Circuit Court of Appeals. And in passing, let us observe the exaggeration that the trial lasted for more than four weeks—it lasted exactly 15 days, from April 20th to May 5th.

The case comes, rather, within the rule announced by this Court in *United States v. River Rouge Co., 269 U. S., 411*, when this Court held:

> "An error which relates, not merely to formal or technical matters, but to the substantial rights of the parties — especially when embodied in the charge to a jury—is ground for reversal unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party."

The Trial Judge charged the jury that Bouchillon and O'Rourke were entitled to bear arms on the public street. This, to a jury, is a condonation of their act—a legal justification of what was obviously a crime.

SECOND POINT.

The District Court Erred, As Found by the Circuit Court of Appeals, in Admitting the Statement Alleged To Have Been Made by Carson After the Shooting.

The Court of Appeals held that the admission in evidence of the alleged statement of Bob Carson, made after the shooting to Mrs. Williams, that the posse had come to kill Williams and had done so, constituted prejudicial error justifying the reversal of the verdict and judgment.

Over the objection of the defendant, Mrs. Williams was permitted to testify and did testify concerning the statement of Carson made to her after the shooting, as follows:

> Q. What did he say, Mrs. Williams?
>
> A. He said they had come to kill Lem Williams and they did kill him.
>
> Q. By whom was Carson employed, do you know?
>
> A. The Great Southern Lumber Company.

In holding that this evidence was improperly admitted and that prejudice resulted to the defendant from the admission of such evidence, the Circuit Court of Appeals said:

> "The court below, over the objection and exception of the defendant, permitted the plaintiff and others to testify that one Bob Carson subsequently introduced as a witness

for defendant said to her in the presence of others that they (referring to the posse) had come there to kill her husband and had done it. The admission of this evidence is sought to be justified both as the statement of a conspirator against the defendant, a co-conspirator, and as a *res gestae* declaration of an agent binding on his principal. Carson had not been examined when the evidence was admitted, and it was not offered to impeach him, but as an admission against interest of the defendant. We think the court erred in admitting this evidence. It was not the declaration of a co-conspirator. The record fails to establish any conspiracy between the defendant and Carson with reference to the deceased. Again, if there had been a conspiracy between them, the object of which was to kill deceased as charged, the conspiracy was ended by the death of deceased, before the statement asserted to have been made was made by Carson. All the shooting was over, the brother of deceased had already been rescued, and O'Rourke, who was wounded, was being put in a car to be taken to a hospital. Carson had been placed at the gate of the deceased's premises to keep order. The statement itself was not a verbal act. It was not made to carry out the conspiracy, but was a mere narration of what had already been done and of its purpose. It was not part of the *res gestae*. Carson was not even employed by the defendant. The evidence of the plaintiff to that effect shows on its face

> that she had no knowledge that would qualify her to testify to his employment. Carson and all other witnesses denied such employment. If Carson was not employed, his declaration, whenever made, would not be binding on the defendant. It was the hearsay of a stranger to defendant, made after the transaction, and narrative of it, and the court erred in admitting it."

Mrs. Williams' statement that Carson was employed by the Great Southern Lumber Company is denied by Carson and the officials of the company and the Chief of Police. Their evidence is uncontradicted, except for Mrs. Williams' casual statement, that Carson had not been in the employ of the company for many years. Carson testified he had not worked for the company since 1910. Cassidy, the General Manager of the company (R. 997), testified that Carson was not working for the Great Southern Lumber Company at the time of the shooting and did not know, despite his many years of connection with the company, that Carson had ever worked for the company, except through the testimony of some witnesses on the stand in this case. Cassidy had been General Manager of the company for fifteen years. Guerre, the Superintendent of the mill, testified that Carson was not employed by the company (R. 623). The Chief of Police testified (R. 551) that Carson was a merchant in Bogalusa and had been for four or five years. Mrs. Williams' casual assertion that Carson was employed by the company would not create any issue of fact against the positive testimony of all of these parties. Mrs. Wil-

liams explained her statement by saying that she thought he (Carson) would not be sacrificing his time for them if he was not being paid by them. (R. 488). This shows that Mrs. Williams did not know that Carson was working for the company but merely assumed it. There is no scintilla of evidence that Carson worked for the company and, in any event, the scintilla rule does not apply in the Federal Courts. Carson denies that he was present at the shooting and testifies that he and others had been sent by the Chief of Police to guard a road leading out of town at a point several miles from the town, over which it had been supposed Dacus might seek to escape. (R. 863). Carson is corroborated in this by the Chief of Police (R. 551-553) as well as by those who accompanied him on this mission (R. 976). Carson and these others testified that, when they heard the shooting, they came in and did not arrive on the scene until more than fifteen minutes after the shooting. Carson denies talking to Mrs. Williams and denies that he made the statement which she attributes to him. However, we concede that there is a dispute of fact as to whether Carson was on the scene but, regardless of whether he was there or not, his alleged statement is no evidence against the Great Southern Lumber Company and such evidence should have been excluded.

Mrs. Williams fixes the time of Carson's statement variously. She says definitely (R. 1048) that Carson made the statement when the officers were taking O'Rourke, who had been shot, out of the yard and to the hospital. She says (R. 1050) "that may be ten or fifteen minutes after the shooting."

Carson, as one of the alleged conspirators, could not bind his co-conspirators by any statement made after the object of the conspiracy (the killing of Williams, as alleged) had been accomplished. In *Spencer v. Read, 217 Fed., 508*, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is undoubtedly true that, in all cases where a conspiracy is shown, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and may be shown in evidence against all. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, either by success or by failure of the enterprise, the admissions of one conspirator by way of narration of past facts are not admissible in evidence against the others."

The petitioner contends that Carson's statement was a spontaneous exclamation at a time when he had not had opportunity to think or reflect, and cites in support of this position the following from *Wigmore on Evidence, Vol. 3, Section 1747:*

> "Since this utterance is made under immediate and uncontrolled dominion of the senses, and during the brief period when considerations of self interest would not have been brought fully to bear by reason and reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness) and

> thus as expressing the real tenor of the speaker's belief *as to the facts just observed by him* (italics ours) and may, therefore, be received as testimony to those facts."

This principle does not cover the point under discussion for two reasons: First, the alleged statement was not made as a spontaneous utterance, but was made after the smoke had cleared away, so to speak, and one of the wounded men was being taken to the hospital; secondly, the speaker was not making any statement about any fact just observed by him but was pretending to state the motive and purpose that impelled those who did the shooting, operating antecedent to their coming to Williams' place.

Furthermore, as the evidence conclusively establishes that Carson was not an employee of the Great Southern Lumber Company, Carson certainly could not bind the company by any statement made by him.

And, even if Carson had been an employee of the company, he could not bind the company by any statement made after the act became an accomplished fact. When O'Rourke was being taken from the premises to the hospital, as the evidence shows was the case, according to Mrs. Williams, and while Carson was standing at the gate after the shooting was all over, it is apparent that the act had been fully and completely performed and the alleged purpose accomplished and, therefore, Carson's statement was nothing more than a narrative of past events, and, under the circumstances, no part of the *res gestae*. Carson's alleged statement did not purport to describe the act or any circumstances attending it, but, if true, simply offered a motive,

operating at an antecedent time, which impelled the persons engaged in the shooting to do the act.

An analogy may be found in these facts: If an automobile travelling at a high rate of speed were to hit a pedestrian, the exclamation of a bystander that the chauffeur was travelling at a furious speed might be admissible as a part of the *res gestae*, notwithstanding the hearsay character of the testimony but certainly no statement by the bystander, after the accident had happened and the injured man was being taken to the hospital, that the driver had previously told him that he was going to drive his car at a high rate of speed and strike the pedestrian, would be admissible.

In *Vicksburg & Meridian Railroad v. O'Brien, 119 U. S., 99-103*, this Court said:

> "While this Court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party. (Citing authorities).
>
> "At the trial below, plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident, about the rate of speed at which the train was moving at the time. To that question the defendant

objected, but the objection was overruled, and the witness permitted to answer.

* * * * *

"We are of opinion that the declaration of the engineer Herbert to the witness Roach was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was, in some degree, subject to his control, still his authority, in that respect, did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestae*—simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his au-

thority as engineer had been fully exerted. It is not to be deemed part of the *res gestae*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstances that it was made between ten and thirty minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view should be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestae*, without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals. These views are fully sustained by adjudications in the highest courts of the states."

The testimony as to the statement of Carson, made under the circumstances above narrated, obviously prejudiced the defendant and the Circuit Court of Appeals properly found that it constituted reversible error.

POINT THREE.

That the District Court Erred in Excluding the Testimony As to Williams' Attempt to Interfere With the Police Officer in Arresting Tom Ezell—the Circuit Court of Appeals Having Failed To Take Cognizance of This Assigned Error.

The Trial Court excluded the evidence of plaintiff's witness, Patrolman Flournoy, tending to show that on one occasion several weeks before the shooting, when Flournoy had arrested one Tom Ezell, a union man, Lem Williams interfered and challenged the authority of the officer, threatened to burn the jail and do bodily injury to the officer if the prisoner was not released. (R. 506). Exception was duly noted, bill of exception reserved and taken (R. 1064) and error assigned (R. 127).

The Circuit Court of Appeals failed to consider the question raised by this exception and assignment of error, although same was pressed in brief. This incident was important in showing the condition of lawlessness existing at Bogalusa during this period and the participation of Williams and his associates in such lawless acts. It is another material circumstance in explaining why Flournoy did not arrest Bouchillon, O'Rourke and Dacus while they were on their armed and lawless pilgrimage in Columbia Road; it offers another reasonable and logical basis to explain why the police authorities were cautious in not attempting to arrest Bouchillon, O'Rourke and Dacus with an inadequate police force; it shows the reason for the state of agitation and caution on the part of the authorities

in dealing with Williams and his associates, it is another of the many important circumstances establishing that the aggression of Williams and his associates, and not the Company's will, was the moving and sole cause for the summoning of the posse to vindicate the law and execute its process through peaceful means.

POINT FOUR.

That Defendant's Motion to Direct a Verdict in Its Favor on the Whole Record Made After the Conclusion of All Testimony Should Have Been Granted and the District Court Erred in Not Granting Same.

At the conclusion of all of the evidence and testimony in the case, and at the close of the case, in open Court and in the presence of the jury and before the charge of the Judge was delivered, defendant, Great Southern Lumber Company, through its counsel, moved the Court to direct a verdict in favor of the defendant on all of the evidence and testimony in the case. (R. 147). The Court denied the motion, whereupon defendant, Great Southern Lumber Company, then and there duly excepted and noted its exception of record. Bill of Exception No. 1, to which all of the evidence and testimony in the case is attached, covers the point and error was duly assigned to the ruling of the Court. (R. 147).

Plaintiff seeks to recover on two grounds:

1. That Williams was killed in pursuance and execution of a conspiracy to kill him, entered into by the Great Southern Lumber

Company, its officers and servants, acting within the scope of their authority; and

2. Williams was killed by the agents and employees of the Great Southern Lumber Company, acting within the scope of their authority.

On this point in the case, the Circuit Court of Appeals, in its opinion, said:

"The District Judge denied the request of defendant for a directed verdict. Upon a subsequent trial, the evidence may differ from that presented in this record, and it is unnecessary to pass upon its sufficiency to establish either or both of the grounds of liability, relied upon by plaintiff to connect the defendant with the killing of the deceased. We do not think the present record contains direct evidence of a conspiracy between the defendant through its agents and strangers to kill deceased. There is evidence tending to show that Guerre, the superintendent of the defendant, caused the whistle signal to be given, when requested by the city authorities, and that he was at the place of the shooting armed, when the shooting occurred, though this was denied by him. An employer is liable for the willful and criminal assault of an employe, committed while he is engaged in acts within his function or the scope of his authority, as, when protecting his employer's property from trespass or destruction. What the employe does, that is beyond the

> subject-matter committed to him by his employer, does not bind the employer. In this case, the evidence tended to show that Guerre was helping to arrest Dacus and the two labor leaders. No express authority to do so is shown to have been conferred upon him by the defendant. A previous course of conduct on defendant's part, from which the authority for its superintendent to assist the police in making arrests could be inferred, would have to be shown. It would also have to appear that the authority was exercised for the benefit of the defendant, as distinguished from the duty of the citizen. If Guerre went to the premises of the deceased to help make the arrest and had been authorized by the defendant to make arrests in its interest, and knowingly aided and abetted in an unlawful killing of deceased, the defendant would be liable, but not otherwise."

The law under which a master is responsible for the tort of his agent is laid down in decisions of this Court and the Supreme Court of Louisiana.

This law in Louisiana is statutory *(Revised Civil Code, 2320)*:

> "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
>
> "Teachers and artisans are answerable for the damage caused by their scholars or

apprentices, while under their superintendence.

"In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it."

In *Washington Gas Light Company v. Lansden, 172 United States, 534-544*, the Supreme Court of the United States said:

"The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. Salt Lake City v. Hollister, 118 U. S. 256, 260; Denver & Rio Grande

Railway v. Harris, 122 U. S. 597, 609; Lake Shore & Michigan Southern Railway v. Prentice, 147 U. S. 101, 109, and cases cited at p. 110.

"In this case no specific authority was pretended to have been given the general manager, Leetch, to write the letters which he sent to Brown, or to authorize the publication of anything whatever in the periodical named. We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself. There is no evidence of an express authority, nor of any subsequent ratification of Leetch's conduct by the company. Can any authority

be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment."

In *Jackson v. Brady, 140 La., 746*, the Supreme Court of Louisiana said:

"Where the arrest of the plaintiff, in an action to recover damages for an alleged malicious prosecution, was made upon the affidavit of one of the defendant's employes, the burden of proof was on the plaintiff to clearly show that such employee had express or implied authority from the defendant to have the plaintiff arrested."

In the course of the opinion, the Court said:

"Excluding the testimony of Robinson, there is no evidence in the record to contradict the direct and positive statements of the defendant and his manager that neither of them had given to the said Robinson any instructions or authority whatsoever to charge the plaintiffs with the offense of obtaining goods under false pretenses.

"As Robinson had no authority to represent the defendant, it follows that all of his

acts and declarations in the premises were *res inter alios acta* as to the defendant."

In *Vara v. R. M. Quigley Construction Company, 114 La., 261*, the Supreme Court said:

"The Civil Code confines the responsibility of masters to damages occasioned by their servants 'in the exercise of the functions in which they are employed.' (Article 2320).

"The syllabus prepared by the Court says:

" 'In a suit for damages for an unlawful arrest, the burden of proof is on the plaintiff to show that the defendant caused, instigated, or authorized the proceeding complained of; and where it is shown that such an arrest was made at the instance of defendant's employees, proof must be clear that they had express or implied authority to cause the same to be made.' "

In the case of *Ware v. Canal Company, 15 La., 169; 35 Am. Dec., 189*, the Court said:

" 'The distinction is obvious between the willful and deliberate acts of agents amounting to offenses which they commit, even when attending to the functions entrusted to them, and those acts of imprudence, unskilfulness, and ignorance in the discharge of their duties, which may occasion injury to others.'

"Hence the circumstance that the agent or employe of defendant was discharging cer-

tain duties for his principal at the time is of no moment, unless the arrest was made in the exercise of the functions in which he was employed."

In *Candiff v. Louisville, New Orleans & Texas Railway Company, 42 La. An., 477*, the Supreme Court of Louisiana said:

"If Esteve's version be true, the shooting of Candiff was as cold-blooded a murder as was ever committed. It presents the conductor as coolly walking up to a man standing quietly, doing and saying nothing, and shooting him down without a word. No stretch of the doctrine that masters are responsible even for the torts of their servants when done within the scope of their employment and in the exercise of the functions in which they are employed, can make it cover such an act as this.

"Admitting that the conductor is charged with the duty of protecting the cars and contents confided to his care, and that acts done in execution of such charge are within the scope of his employment, and admitting that he supposed Candiff had broken into the car, and shot him for that reason, in what manner was such shooting, under such circumstances, necessary or conducive to the protection of the property?"

In *Valley v. Clay, 151 La., 710*, the Court said:

"For a master to be liable for an injury, it must have been caused by some act ex-

pressly or by reasonable implication within the scope of his agent's employment.

"If a service be performed in an unlawful or even a criminal manner, the master is liable so long as the thing done forms a part of the servant's duties.

"In the absence of special instruction or agreement, it is not within a chauffeur's duty to protect his employer's family against assault, insult, or abuse at the hands of third persons, and he is not acting within the scope of his employment in assaulting one using abusive language, when narrowly escaping being struck by the automobile.

"In an action for an assault by defendant's chauffeur as the result of abusive language used by plaintiff when almost struck by the automobile, an allegation that the chauffeur was acting within the course of his authority to protect the occupants of the car was but a legal conclusion."

In *Hale v. Gilliland Oil Company, 151 La., 500,* the Court said:

"Conceding, for the moment, that the facts alleged do not show that he was injured while in the course of his employment, has he alleged a cause of action under the Code? We think not. He says, in substance, that, as a part of his employment, he was assigned to a particular bunk in a bunkhouse furnished by his employer for his exclusive use, and had so occupied it; that late one night he returned

to the said house and found his bunk occupied by some one else; that he thereupon went to the foreman in charge of the bunkhouse, 'as he was in duty bound to do,' and asked him to have the bunk vacated or to furnish another; that the foreman became angry at having been thus awakened, placed his hand upon plaintiff's shoulder, and said, 'I have a mind to blow your damn brains out;' and that he then pulled a 45 caliber pistol and shot plaintiff through the head, totally disabling him for life.

"The petition does allege that the foreman was acting within the scope of his agency when he shot the plaintiff, but that is only a conclusion of the pleader. He was not employed to assault or murder people, but to see that the employees were properly cared for in the bunkhouse, and suddenly turned away to vent his anger upon the plaintiff for purposes of his own. The employer was therefore not liable for his act."

In the case of *Godchaux v. Texas & Pacific Railway Company, 144 La., 1041*, a railway company's station agent, who was also employed as express agent, attacked one calling for a shipment. The Court said:

"It is not enough, however, to support the doctrine of *respondeat superior* that the quarrel that resulted in the tort committed by the servant arose from and out of the business which he had authority to transact, and that he was acting within the scope of his

employment at the moment when he stepped aside from the business of his master to commit the wrongful act on his own behalf and without regard for the business of the master. The responsibility of the master for the tort committed by his servant does not depend upon whether the tort was committed in the course of the employment; the test is whether the tort was committed within the scope of the employment. * * * "

The Court said:

"In this case, for example, if it had been within the scope of the agent's authority or employment to eject a disturber from the employer's premises, the employer would be responsible for the agent's wrongful or excessive manner of exercising the authority. There is neither allegation nor proof that the agent, in this case, had authority to serve as a police officer, or peace officer, or, in any circumstances, to eject any one from the employer's premises. The only question is whether the wrongful act of the agent was merely an excessive manner of performing a duty within the scope of his employment, or so far exceeded the scope of the employment as to be entirely beyond contemplation on the part of the employer.

"It would serve no good purpose to select from the many adjudged cases the one best fitted to this case in point of fact, and decide accordingly.

"Most certainly it is a dangerous rule, of perhaps far-reaching consequences, that would be declared by this precedent, should the employer be held in damages for this murder committed by the employee under the circumstances in evidence. It is going beyond all rules of liability to permit such a bare conjecture that the homicide was done in furtherance of any duty to the master to stand as a finding of fact, where, as here, a willful, deliberated, premeditated killing resulted, and where every act done bespoke a defined purpose and intent in the assailant, born of his own malice, to injure or kill another. That the cause of the quarrel of the night before was the milking of the cow, or delaying supper, and concerned the business of the master, is wholly immaterial. That business was a closed incident, having no relation in law to subsequent events, except as it furnished the motive and engendered the hatred that gave vent in murder the next morning."

164 N. W., 684.

In *Varnes v. Seaboard Air Line Ry. Co., 86 Southern, 433*, the Supreme Court of Florida said:

"There was no evidence to show that the man Hicks was the agent of the defendant to protect the train from trespassers or the intrusion of trespassers upon it, or from stealing rides on it, nor that in shooting Fox he was acting within the scope of his authority as an employee, nor within the apparent scope of his authority. The theory of *respondeat*

superior was the only one upon which the declaration could be held to state a cause of action, and it was wholly unsupported by the evidence."

There is not one word of evidence in this record tending to prove that a conspiracy existed or from which it may be reasonably inferred that a conspiracy existed. On the contrary, the evidence is conclusive and overwhelming that the disturbance which took place in Bogalusa followed directly from the overt and provocative act of Bouchillon, O'Rourke and Dacus in parading the public streets and defying and challenging the authority of the law and that the men who did the shooting were officers of the law, regular and special, appointed and recruited by the constituted authorities, for the purpose of preserving the public peace and protecting life and property in that community.

There is not one word of evidence in this record to show that any officer of the Great Southern Lumber Company knew of the disturbance by these three men or took any part in the measures adopted by the authorities to preserve the peace and enforce the law. No officer or employee of the Great Southern Lumber Company was a member of the special police force. They were expressly excluded, as were all union men. The special officers were summoned to duty on the occasion in question by direction of the Commissioner of Public Safety and the Chief of Police. Neither the Great Southern Lumber Company, nor any of its officers or employees took part in summoning the special officers, except that the whistle of the Great Southern

Lumber Company was used as a signal for the summoning of the officers.

The record shows conclusively that the Commissioner of Public Safety and the Chief of Police ordered the whistle blown as the signal for the summoning of the special officers and that the company had consented that its whistle, which was the only available means in the town for giving a signal, might be used by the police authorities whenever they desired. The record further conclusively shows that, on a previous occasion, in pursuance of this consent, the whistle was used to summon the special police officers to quell a riot and that the riot was quelled without bloodshed or injury to anyone.

Much stress was laid in the petition and in the Courts below that the use of this whistle as the signal for the assembling of the special police officers establishes the connection of the Great Southern Lumber Company with the alleged conspiracy and fixed its responsibility for the acts of the citizens who were summoned to duty through the medium of this whistle. This conjecture has no basis in fact or in law and the effect of the blowing of the whistle is totally destroyed in the light of the undisputed evidence that the police authorities requested permission to use the whistle for lawful purposes.

If the police officers, assembled and called to duty through the use of this whistle, thereafter committed a tort or exceeded their authority, certainly the blowing of the whistle was not the proximate cause of the injury and it cannot be said that there is any causal

connection. The officers and employees of the Company were not members of the League; they had no part in its formation or its purposes. No officer or employee of the Company knew anything about the Columbia road affair; none knew of or took any part in the issuance of the warrants or the means adopted for their execution. The public authorities alone acted on their own responsibility.

That there had been disturbances in Bogalusa, directed in some measure against the Great Southern Lumber Company, does not justify the inference that an employee of the Great Southern Lumber Company who thereafter participated in a murder, if murder was committed, was acting within the scope of his authority. That the elimination of Williams from the labor situation in Bogalusa would have tended to improve that situation, from the company's standpoint, if conceded, does not justify the inference that it was within the scope of the employment of any such agent or employee to participate in the alleged murder of Williams. That the Superintendent of the defendant's mill, Guerre, about whose participation in the affair the evidence is contradictory, was present at the shooting with a gun in hand, does not justify the inference that he was acting for and on behalf of the company and within the scope of his authority.

So far as Guerre knew, as an employee of the company, the whistle was blown by direction of the police authorities to assemble the special police officers and these police officers were engaged, under the direction of the constituted authorities, in the performance of a police duty. That he accompanied them in the un-

dertaking, does not carry with it the inference that he was there as an agent of the company acting in its behalf and for its purposes and within the scope of his authority.

Some of plaintiff's witnesses state Paul LeBlanc, an Assistant Superintendent of the Company, was in the crowd, and also Townsend, a sales agent (who Sullivan says was playing golf with him at the time), as well as Dr. Brister, a physician engaged in general practice, who was on the staff of the general hospital maintained by the defendant and other industries in the City of Bogalusa.

If these men were present, there is no inference to be drawn that they were there in pursuance of a conspiracy to kill Williams or that they were there representing and in behalf of the Company in pursuance of authority, express or implied. They were certainly on no mission of the Company.

Likewise, it was agreed that, because Wily Magee, the regular police officer, who had the warrant and participated in the shooting, lived in a house which he rented from the Company, it is to be inferred that he represented the Company. Magee was a regular policeman, on the City's payroll and was ordered by the Commissioner and Chief to go with the posse and to hold the warrants. What basis is there for the conjecture that this public officer was the agent of the Company and was acting in its behalf when he was engaged in the discharge of his official duty by order of his superiors?

Plaintiff carries the burden of proof that these participants were agents and employees of the Great Southern Lumber Company and were acting within the scope of their authority when they killed her husband. She has failed to discharge this burden. Her statements that all of the so-called gunmen were so employed does not discharge the burden which she carries and must meet.

The record not only shows plaintiff has failed to discharge this burden of proof but it definitely establishes that Williams met his death at the hands of police officers of the City of Bogalusa and not at the hands of any agents or employees of the Company acting within the scope of their authority.

It is manifestly difficult to argue a negative. The record is barren of any proof of conspiracy or any facts from which a conspiracy can be inferred. The record is likewise barren of any proof that Williams met his death at the hands of agents or employees of the Great Southern Lumber Company acting within the scope of their authority. The positive testimony is that Williams met his death at the hands of the police authorities of the City of Bogalusa, assisted by special police officers who went to his place of business for the purpose of executing warrants for the arrest of offenders against the public peace and that this breach of public peace was an unjustified and provocatory act against the authority of the law and a challenge to the officers of the law with which neither the Great Southern Lumber Company nor any of its officers or agents had any connection or relation whatsoever.

The testimony of the Vice-President and the Assistant General Manager of the Company, who were the responsible officials present in Bogalusa at the time, testified they knew nothing of these occurrences and had no knowledge that any warrants had been issued until the shooting had taken place and was over.

There is nothing to connect the Great Southern Lumber Company with this transaction and the mere fact that there had been labor disturbances and acts of violence committed in Bogalusa by Williams and his associates which had disturbed the peace of the community would not justify the inference that the Great Southern Lumber Company connived or participated in the shooting of Williams.

The charge in this case against the Great Southern Lumber Company and its officials is one of the most heinous charges that can be brought against any man and, because of its nature and gravity, it is essential that it be established by proof and not by wild and baseless conjecture.

The positive denial of the officials of the Company that they participated in any conspiracy or authorized or induced or connived with, any one to kill Williams, cannot be overcome by the wild and unsupported charges of witnesses in behalf of the plaintiff that the Company employed a lot of gunmen and that the substantial citizens, who assumed the disagreeable task of acting as temporary officers of the law to protect their homes and the peace of the community in which they lived, were the hirelings or confederates of the

Company in the accomplishment of a crime against God and man.

If the Circuit Court of Appeals had not reversed the judgment of the District Court on the specific grounds that the defendant had been substantially prejudiced by the exclusion of competent and material evidence and the admission of incompetent evidence, it is patent that it would have reversed the judgment on account of error of the District Court in failing to direct a verdict for the defendant. (See Court's opinion). Therefore, if for any reason, this Court should find that the Circuit Court of Appeals was in error in reversing the judgment on matters of evidence, the judgment of the District Court should nevertheless be reversed because of error in not directing a verdict for the defendant on its motion.

POINT FIVE.

That Both the District Court and the Circuit Court of Appeals Erred in Overruling and Not Sustaining Defendant's Exceptions of No Cause of Action and Prescription.

The original petition of plaintiff was filed, November 6, 1920, in her own behalf and for the use and benefit of her minor son, without her previously having qualified as tutrix under the law of Louisiana. This petition attempted to set forth a cause of action based upon the liability of a master for the acts of his servants acting within the scope of their express authority; the petition contains no allegation of any conspiracy to kill Williams.

Exception of no right or cause of action was filed to this petition levelled, first, at the lack of capacity in plaintiff to sue in behalf of her minor son without first having qualified as tutrix, and, secondly, to the imperfections and deficiencies in the petition resulting in a failure to state a legal cause of action (R. 9); and on January 8, 1921, this exception was sustained with leave to plaintiff to file an amended petition within thirty days. On February 4, 1921, more than fourteen months after the date of the alleged tort, which occurred November 22, 1919, plaintiff filed a supplemental petition setting forth that she had meanwhile qualified as tutrix of her minor child and sued in her own behalf and as tutrix. In this supplemental petition, there is propounded for the first time a cause of action, based upon an alleged conspiracy on the part of the Great Southern Lumber Company, its servants, employees, and other persons unknown, to kill Williams.

Defendant, Great Southern Lumber Company, filed exceptions to this supplemental and amended petition on the ground that it was vague, indefinite, uncertain and multifarious, and attempted to set up alleged causes of action different from the alleged causes of action set up in the original petition, and that it did not set forth any right or cause of action. Defendant also pleaded the prescription (limitation of action) of one year, under Article 2315 of the Revised Civil Code of Louisiana, to the right of plaintiff to sue as tutrix of her minor son or in her own behalf, as well as on the "conspiracy" cause of action propounded for the first time in the supplemental and amended petition.

Article 2315 of the Revised Civil Code of Louisiana, upon which these exceptions and the plea of prescription are based, is as follows:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children or surviving spouse of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, and in default of any of the above persons, then in favor of the surviving brothers and sisters, or either of them, for the space of one year from the death, provided that should the deceased leave a surviving spouse together with minor children, the right of action shall accrue to both the surviving spouse and minor children; provided further, that the right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.
>
> "The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, or brothers or sisters, as the case may be."

These exceptions were overruled by the Trial Court and in due course defendant filed answer, reserving the benefit of the exceptions and reiterating the plea of prescription under Article 2315 of the Revised Civil Code of Louisiana.

Error was duly assigned to the action of the District Court in overruling and in failing to sustain defendant's exceptions. (R. 111).

In its opinion (R. 1084), *17 Fed. Reporter (2d), 467*, the Circuit Court of Appeals sustained the action of the Lower Court on this point in the following language:

> "The plaintiff, after the lapse of more than a year from the date of the deceased's death, by leave of court, amended her petition. The contention of the defendant is that the amendment introduced a new cause of action, not contained in the original petition, and barred by the Louisiana prescription of one year. If the amendment is given the effect contended for by defendant, the new cause of action would, under the jurisprudence of Louisiana, have been prescribed by the limitation of one year. The contention of the defendant is that the original petition contained no cause of action based on an unlawful conspiracy between defendant and others to kill deceased, to remove him from defendant's path because of his labor activities. While the original complaint, as we construe it, set out the cause of action for unlawful conspiracy in too vague and uncertain terms to be good against exception, it did present, though imperfectly, such a cause of action, together with one based upon the principle of *respondeat superior*. We conclude that the cause of action for unlawful conspiracy

was not subject to prescription at the time the amendment was filed."

In sustaining the action of the Lower Court, the Court of Appeals, in effect, said that it was able to eke out from the original petition a charge of conspiracy and that, therefore, the supplemental petition which propounded a cause of action based upon conspiracy did not set forth a new cause of action which would be subject to the prescription or limitation provided by the Louisiana statute. The Court failed to consider the exception insofar as it challenged the right of the tutrix to sue in behalf of the minor in a supplemental petition filed more than one year after the date of the commission of the alleged tort.

In *Tremont Lumber Company v. May, 143 La., 389*, at *page 395*, the Supreme Court of Louisiana said:

> "The amendment should not have been allowed. A petition upon which no judgment can be pronounced does not show a cause of action; and a petition which does not show a cause of action is, legally speaking, no petition, and hence cannot be amended. For definition of a petition, see American Sugar Refinery Case, 138 La. An. 283, 6 South. 529, this court said: 'The court is powerless to authorize an amendment which would insert a cause of action when none was previously averred.' In State v. Hackley, Hume and Joyce, 124 La. 854, 50 South. 772, the court said: 'Unless a cause of action is alleged

there is no suit, and hence nothing to amend.' See these cases quoted with approval in Godchaux v. Hyde, 126 La. 187, 52 South. 269.

"Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit; the suit must be considered as dating only from such filing, and not from the filing of the original petition; and the supplemental petition must be served upon the defendant, and the delays for answering must be allowed as in the case of an original petition. Hart & Co. v. Bowie, 34 La. An. 323; Raymond v. Palmer, 35 La. An. 281; Ursuline Nuns v. Depassau, 7 Mart. N. S. 645; 1 C. J. 1159. In the instant case the supplemental, or amended, petition was not served on defendants; defendants were never cited to answer it; they duly excepted on the ground to being required to answer it.

"But the serving of it would have been of no avail, as the date of its filing was the 6th of November, five days after the expiration of the delay allowed by law for the filing of suits of that character. 'The action to test such correctness (the correctness of an assessment) shall be instituted on or before the first day of November of the year in which the assessment is made.' Section 26 of Act 170, p. 346, of 1898. The defendants duly excepted on that ground also."

The filing of the amended petition by Mrs. Williams, tutrix of the minor, after more than a year had elapsed after the death of Williams, was the first time that a legal demand for damages was made on behalf of the minor. It was barred by prescription and came too late.

Mrs. Williams could not legally bring suit or stand in judgment for her minor son until she had qualified as tutrix.

In *Koepping v. Monteleone, 143 La., 353*, the Supreme Court of Louisiana held:

> "A surviving parent, who is not the qualified tutor or tutrix of his or her minor child, cannot sue on behalf of his or her minor child."

And, in the course of its opinion, the Court said:

> "As regards minors residing in this state, the law is:
>
> " 'Minors, persons interdicted or absent, cannot sue, except through the intervention or with the assistance of their tutors or curators.' (C. P. 108).
>
> " 'As there is no allegation in plaintiff's petition as to the law of her domicile, or that it is different from the law of this state, the presumption is that the law of Illinois is the same as the law of this state, and that minors cannot sue "except through the intervention or with the assistance of their tutors or curators." The law is clear and explicit; and con-

tains an express prohibition against minors suing in the courts of the state, except with the assistance of their tutors or curators.' "

"* * * We have also been referred to the decision of the court in the case of Creagh v. New Orleans Ry. & Light Co., 128 La. 305, 54 South. 828, which was brought by a mother, who had married a second time, for personal injuries to her minor son of a former marriage. In that case Mrs. Creagh sued as the natural tutrix of her son; and no exception was filed *in limine* to her capacity to sue. That exception appears to have been filed in the answer; and plaintiff qualified as natural tutrix before the trial of the case on the merits. It was there said:

" 'The general rule of law is that any person, natural or artificial, may sue in the courts of the country.'

"And the exception in the answer was overruled. The codal provisions were not referred to or considered in that case.

"In view of the law that minors, after a dissolution of the marriage of their parents, must be placed under the authority of a tutor, and the prohibition contained in article 108, C. P., to the effect that 'minors cannot sue except through the intervention of or with the assistance of their tutors or curators,' the exception to the capacity of plaintiff to sue and stand in judgment herein was properly sustained."

This is the latest expression of the Supreme Court of Louisiana on this subject.

The petitioner, plaintiff below, seeks to support the action of the Trial Court under the authority of the decision in *Lanis v. Illinois Central, 140 La., 1, 72 Southern Reporter, 788.*

In that case, the widow of a railway employee, killed through the negligence of the company in interstate commerce, brought suit in her individual capacity for damages under a State statute, and the defendant excepted to the proceedings on the ground that the right of action under the Federal Act precluded a right of action under the State statute. Subsequently, plaintiff was allowed to amend her petition by appearing in the capacity of administratrix for the benefit of herself and her child. The amended petition was filed more than two years after the date of the death. The plea of prescription or limitation, under the Federal Employers' Liability Act, was interposed.

The Court held:

> "* * * It is proper to allow the plaintiff to amend her petition by appearing in the capacity of administratrix and personal representative of the deceased for the benefit of herself and her only child. And, in such case, as to the demand for the benefit of the widow, the prescription of two years does not apply if her original petition was filed and served within two years from the fatal accident, notwithstanding her supplemental petition, as personal representative of the deceased, was filed after two years had elapsed."

This decision does not hold that the amendment was good as to the claim of the minor child, but, on the contrary, declares that it finds it unnecessary to decide the question, in view of the fact that the award for the benefit of the child was limited to $1.00, and under the maxim, "*de minimis non curat lex*," such an award does not even affect the costs.

In commenting upon this decision the editor of the *American Law Reports Annotated, Vol. 8,* at *page 1421,* says:

> "The court held that it was proper to allow plaintiff to amend the petition by appearing in the capacity of administratrix for the benefit of herself and child and that, as to the demand for the benefit of the widow, the amendment might be allowed, although more than two years had elapsed from the accrual of the cause of action. But the court was of opinion, apparently, although it was unnecessary to decide the point, since the damages recovered for the child were purely nominal and did not affect the costs, that as to a demand for damages for the benefit of a child of the deceased, made for the first time in the amendment, a new cause of action was stated, which would be subject to the limitation of the Federal statute."

In any event, the case of *Koepping v. Monteleone, 143 La., 354, supra,* was subsequent in point of time to the case of *Lanis v. I. C., supra.*

Another case cited by petitioner, plaintiff below, in support of this position, is *James v. City of New Orleans, 151 La., 480, 91 Southern, 846.* This case is not in point; it simply announces a familiar rule of law in the following language:

> "Although defendant's attorneys denominated their plea or exception to the original petition of no cause or right of action, it was, in substance and reality, an exception of vagueness or insufficiency of detail in the allegations of the petition. The complaint was that the petition should have shown why and how the municipal authorities ought to have been aware of the condition of the cover of the manhole. * * *
>
> "The purpose of the proposed amendment was merely to do away with defendant's complaint that the original petition did not disclose, specifically or in detail, what facts plaintiff intended to prove, in support of his allegation that the municipal authorities were at fault in their failure to observe that the cover of the manhole was defective and dangerous. We cannot imagine any just reason for the refusal to allow the amendment. As the motion did not set forth a new cause of action, it was an error to say that the cause of action therein referred to was barred by the prescription of one year, subsequent to the filing of the suit." (Citing authorities).

Plaintiff's supplemental and amended petition, filed more than one year after the alleged tort set forth

for the first time a cause of action based upon conspiracy. We believe that the Circuit Court of Appeals erred in holding that the original petition, although imperfect and deficient, sets forth a cause of action based upon conspiracy. It will be necessary for the Court to read that petition in order that it may determine for itself whether that petition contains any allegation of conspiracy. No defendant called upon to meet the issue propounded by the petition could be held to suppose that evidence would be introduced to establish a conspiracy on the part of the defendant and its employees and strangers to kill Williams. We venture to suggest that the Court would not have permitted evidence of a conspiracy to be introduced under the allegations of the original petition. It cannot be said that the defendant was fairly apprised by that petition that it was called upon to meet a charge of unlawful conspiracy.

In *Tremont Lumber Co. v. May, 143 La., 389,* at *page 395, supra,* the Supreme Court of Louisiana said:

> "Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit; the suit must be considered as dating only from such filing and not from the filing of the original petition."

The principles involved are fully discussed by this Court in the case of *Union Pacific Railway Company*

v. Wyler, 158 U. S., 285, where all of the authorities are reviewed. In its opinion this Court said:

> "The courts have, by their decisions, made application of these principles to changes in the facts averred or law relied on, thus illustrating the rule in many aspects. Where it was first alleged in an action for libel that the defendant had attacked the solvency of plaintiff, and by amendment that he had assailed the plaintiff's integrity in his personal conduct without questioning his solvency, this was held to be a new cause of action. Mohr v. Lemle, 69 Ala. 180. See also Smith v. Smith, 45 Penn. St. 403, where the same rule was applied in the case of slander. Where a party alleged that he was forcibly ejected from a train, and then by amendment averred that he was misled by the agents of the corporation into getting off at the wrong station, it was held to be a new cause of action. A. G. S. R. v. Smith, 81 Ala. 229. Where a party declared upon a contract, under which he claimed as assignee, and amended so as to rest on a contract which he alleged was made directly with himself, it was held a new cause of action. Bingham v. Talbot, 63 Texas, 271.
> * * *
>
> "The amended petition, which averred the statute of Kansas, having asserted a new cause of action, the next question is, was recovery under this petition barred by the Missouri statute of limitations? The general rule is, that an amendment relates back to the

time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceased to exist, and hence the rule itself no longer applies."

In *Boston & Maine Railroad Company v. Hurd, 108 Fed., 116*, the United States Circuit Court of Appeals for the First Circuit says:

"The declaration in an action by an administrator in the New Hampshire Circuit Court stated a cause of action against a railroad company at common law for injuries to plaintiff's intestate, coupled, possibly, in view of the allegation of death, with some thought of the supplementary damages given by the New Hampshire statutes. By an amendment thereof it declared under Pub. St. Mass. c 112, 212, specially authorizing actions against railroads for wrongful death, and limiting actions thereunder to one year from the time of the injury. Held, that the amendment was a change of the ground of

action, constituting a departure, and that inasmuch as the one year limitation which followed the remedy under the Massachusetts statute had expired when the amendment was offered, the action was barred. Railway Co. v. Wyler, 158 U. S. 285."

In *Atlanta, K. & N. Ry. Co. v. Hooper, 92 Federal Reporter, 820*, the Circuit Court of Appeals for the Sixth Circuit, speaking through Taft, Circuit Judge, said:

"The sole question presented upon this record is whether, when an administrator, under the present Code of Tennessee, brings his suit to recover damages for the wrongful death of his intestate, and avers in his petition that he brings the suit for the benefit of one person as the intestate's next of kin, and subsequently substitutes in his declaration for that person the name of another as next of kin, this is a change of the cause of action, such that the statute of limitations runs to the date of the amendment." * * *

"The cause of action may, therefore, vary materially in the extent of the recovery, as it is brought for one or another beneficiary. The administrator, except where there is a widow or child, must bring the suit; but his suit for one beneficiary is a different suit from a suit by him for another. To change the beneficiary, under the statute, changes the suit, the amount of recovery, and states a new and different cause of action. In the

> light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained."

The pertinency of this latter decision to the facts of the instant case is apparent. For the acts of agents within the apparent scope of their authority, the jury might well have adopted one measure of damage. For the acts of the conspirators in furtherance of a conspiracy to commit murder, the jury might well have adopted another and more severe measure of damage.

The case, however, went to the jury on both causes of action—conspiracy and *respondeat superior*. It is not possible to determine upon what considerations the jury's conclusions were based. The verdict was a general verdict for $50,000.00.

The cause of action based upon conspiracy being barred by prescription, the verdict cannot stand, and should be reversed.

In *Southern Pacific v. Hamilton, 54 Federal, 468*, the Circuit Court of Appeals for the Ninth Circuit, McKenna, Circuit Judge, says:

> "A passenger refused to sign his railway ticket, thus violating its provisions, and rendering it void, and drew a pistol to resist an effort on the part of the conductor to eject him. He was afterwards arrested, on complaint of the railway company, and removed from the train, by a constable, who after such removal kept him in irons for 20 minutes before procuring a warrant. The passenger

was acquitted in a criminal prosecution wherein the railway company's agent swore to the complaint. In a suit by the passenger against the company the constable testified that he acted merely as a peace officer, and on information that a pistol had been drawn. Held, that an instruction that, if the company caused the arrest merely to eject the passenger from the train, the constable was its special agent for that purpose, for whose unnecessary violence the company would be responsible, was erroneous, since it failed to discriminate between the acts of the officer while removing the passenger, and afterwards; and where such passenger, having suffered no great bodily harm, recovers $44,000 for his injuries, the verdict, although reduced by the trial judge to $15,000, should be set aside, as influenced by the erroneous instruction, and a new trial ordered."

Following the principles of this decision the verdict of the jury in this case was obviously influenced by the testimony, charge of the Court and other proceedings on the conspiracy cause of action, and, therefore, a new trial should be ordered.

In *Lake Shore Railway Company v. Prentice, 147 U. S., 101-117*, the Supreme Court of the United States said:

"But the only fact which they (the jury) were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal con-

duct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial."

REPLY TO THE ARGUMENT AND STATEMENTS IN PETITIONER'S BRIEF.

As this respondent was furnished with a copy of petitioner's brief only eight days before the probable date of the argument, it has been driven to the necessity of answering that brief as an addendum to this brief. The questions of law have all been handled in the main part of this brief. We will confine ourselves here to petitioner's statement of the facts and the arguments based thereon.

On page 7 of petitioner's brief, it is stated that:

"The refusal of the Great Southern Lumber Company to recognize the labor union and its opposition to the organization of the colored laborers into a union, created hostility between Lem Williams, his associates, the organizers of the labor union, both white and black, and the Great Southern Lumber Company. This hostility was manifested on several occasions. At one time, the electric lights and the water of the town, which was supplied by the machinery of the Great

Southern Lumber Company, were cut off for twenty-four hours, Williams and his associate labor union men having gotten the employees to abandon their posts.

"The Great Southern Lumber Company, by way of protecting itself against the members of the union, had erected a high board fence around its mill property and stationed machine guns inside, with armed men at the gates. It had a number of gunmen in its employ and among them was Wiley Magee (the man who led the mob and killed Williams). (R. 998-999). Such was the condition in Bogalusa on November 21, 1919, when a warrant was sworn out before the City Court of Bogalusa, charging Sol Dacus with being a dangerous and suspicious character, presumably under an ordinance of the city (which, however, was never produced in evidence) as there is no such offense known under the state statute, and a warrant was issued for his arrest and delivered to the Police Department." (R. 153).

This is all that the petitioner has said with regard to a condition of anarchy and lawlessness existing in the City of Bogalusa for a period of two months, during which riots and disorders occurred, men were shot, public officials intimidated, jail deliveries attempted, necessary public service cut off and a reign of terror inaugurated and maintained.

The only acts of aggression on the part of the Great Southern Lumber Company charged in this state-

ment are that it erected a high board fence around its mill and stationed a machine gun inside its property with armed men at its gates and that it had a number of gunmen in its employ, among them Wiley Magee who led the mob and killed Williams.

There is much said in the petition about gunmen but this record fails to show that the Great Southern Lumber Company had in its employ any gunmen. Wiley Magee, the man who it is stated led the mob and killed Williams, was and had been for some time a regular police officer of the City of Bogalusa, carried on its payroll as such, according to the testimony of Chief of Police, the City Clerk and the Commissioner of Public Safety, and he had not been in the employ of the Great Southern Lumber Company for many years.

The board fence around the company's property had been built in the Spring of 1919. The stationing of a machine gun inside the property and armed watchmen at the gates was certainly justified by the unlawful acts of Williams and his associates, particularly in intimidating the men engaged in running the electric light and water plant and, in fact, shooting one of them in their attempt to cause a cessation of these necessary services and generally in carrying on a campaign of lawlessness and terror in that community.

The statement is made on page 8 of petitioner's brief that the charge against Dacus had been maliciously made to intimidate him and the colored laborers and destroy all possibility of organizing a colored labor union by lodging their leader in jail.

This is a purely gratuitous presumption on the part of the petitioner and is not supported by any evidence. Dacus was summoned as a witness by plaintiff, a subpoena was issued for him and served, but he was never placed on the witness stand, although he was in attendance during the trial. When we recall that things had been quiet in Bogalusa for several weeks prior to the Dacus incident, it was manifestly the duty of plaintiff to produce Dacus as a witness in order that his connection with this unfortunate transaction might be shown. The warrant against Dacus was sworn out by H. H. Wilcox, a merchant of Bogalusa, who testified he was never at any time connected with the Great Southern Lumber Company. The evidence shows that no one connected with the Great Southern Lumber Company had any knowledge that any charge had been made against Dacus or that any officer or employee of the Great Southern Lumber Company had any connection with or relation to the making of that charge. It will be remembered that although Williams and his associates began in July to organize the company's labor, no disturbances of any kind occurred until the mill stopped operations as the result of a serious breakdown and that the resulting condition of idleness furnished the opportunity for the lawlessness and aggression on the part of Williams and his associates, with evidence of which this record teems. It is not even pretended that prior to the breakdown of the mill there were any troubles between the Company and its labor or the labor leaders.

It is stated on page 8 of petitioner's brief that

> "the evident purpose which Bouchillon and O'Rourke had in view (meaning their march

> on Columbia Road) was to restore confidence in Dacus and his colored laborers and counteract the effect of the malicious warrant which had been issued for the purpose of intimidating him and destroying the union."

This "evident purpose" is not shown or supported by anything in the record; it is an invention of the advocate's brain—an attempt to minimize the true cause of the trouble. On the contrary, Dunaway, summoned as a witness by plaintiff, but sworn as a witness for defendant, furnishes the only direct explanation of the motive which prompted the unlawful march. He testified that he was in Williams' office between nine and ten o'clock of that day and that Dacus was there; that Williams wanted some of the men there to go with Dacus to his house and protect him; that witness declined to do this and told Williams that if he were Williams he would telephone to the police and let them handle it; that O'Rourke and Bouchillon, armed with shotguns, went off with Dacus and that Williams told them, "If anyone tries to serve him, stay with him, stay with the old darky," and Bouchillon and O'Rourke replied, "We will stay with him." This evidence shows plainly that Williams proposed, with the force of armed men, to afford protection to Dacus from arrest. This testimony is uncontradicted. (R. 927-929, 934, 935).

There is no evidence in the record to show that the purpose of Bouchillon and O'Rourke was to restore confidence in Dacus and his colored laborers but, if that were their purpose, they certainly adopted unlawful means to accomplish their purpose. That they

were armed with shotguns is conceded and the Trial Court charged the jury that they were entitled to bear arms openly. In view of this now declared intention of Bouchillon and O'Rourke, it was certainly competent for the defendant to show the means which they adopted to accomplish the purpose and the unlawful nature and character of the march which provoked the trouble.

On page 8 of petitioner's brief, it is said:

> "These warrants of arrest were placed in the hands of Magee, not a regular police officer, but a special police officer, the Great Southern Lumber Company's noted gunman."

This often repeated statement is absolutely contradicted by the record. Magee was a police officer on the city's payroll (R. 550), and the Commissioner of Public Safety and the Chief of Police testified that they placed the warrants in his hands because he was a regular and paid police officer. (R. 550-584).

On page 9 of petitioner's brief, it is stated:

> "At one o'clock p. m. the siren whistle of the Great Southern Lumber Company, the whistle which was blown every day at six o'clock p. m., as a signal for the laborers to stop work, which also had been used in an emergency when there was a fire, was blown. There was, however, no fire, no emergency, no riot at that hour, but the defendant contends the whistle was blown as the result of an agreement with the Chief of Police and the officers of the Great Southern Lumber Com-

pany, to summon the special police officers, a posse, so called, to arrest Dacus, O'Rourke and Bouchillon."

This statement is absolutely unfounded and incorrect. There was no fire, it is true, but there was an emergency, an incitement to riot. The true facts were kept from the jury but this Court knows from the record that Bouchillon and O'Rourke, armed with shotguns, were parading the main street of the town defying the law and the officers of the law and threatening to protect Dacus against arrest with force of arms, if necessary, and that their mission in being there was to protect Dacus from arrest, as Williams told them when they left, "If anyone tries to serve him, stay with him, stay with the old darky."

The statement that this whistle was blown by agreement between the Chief of Police and the officers of the Great Southern Lumber Company to summon the posse to arrest Dacus, O'Rourke and Bouchillon is contrary to the undisputed facts in the record. There had been an understanding, made a number of weeks before the incident, between the Chief of Police and the Commissioner of Public Safety on the one hand, and the assistant manager of the Great Southern Lumber Company on the other hand, that the whistle might be used by the police authorities when occasion arose for the summoning of the special officers but there was no agreement that the whistle should be blown in this instance to summon the special officers to effect this particular arrest. Pursuant to the general understanding, the whistle had been blown on a previous occasion to summon the special officers and they responded and

suppressed an incipient riot but there was no understanding on that occasion or on the occasion when the warrants were issued that the whistle should be blown for these particular purposes.

The officers of the Great Southern Lumber Company knew nothing of the Dacus incident and they knew nothing of the Bouchillon-O'Rourke-Dacus march and the issuance of warrants for their arrest. These situations were handled exclusively by the police authorities and the statements in petitioner's brief are incorrect.

It is likewise stated on page 9 of petitioner's brief that Major Guerre, the superintendent of the plant, was in the posse and so was Paul LeBlanc, foreman, as well as Dr. Brister, superintendent of the company's hospital, Bob Carson, McElroy, Wiley Magee and George Townsend, sales manager, and many others who were not identified as employees of the company because the books of the company, which were called for by a *subpoena duces tecum* had been burned by the defendant company.

There is testimony that Major Guerre was at the shooting and that Paul LeBlanc was also there, as well as Dr. Brister. The latter denies that he was present and, in any event, the testimony shows conclusively that he was on the general staff of the hospital which was maintained and supported by all of the industries in Bogalusa as a general hospital and was not in the employ of the defendant. Bob Carson and others, see *supra*, deny that Carson was there but, in any event, the record shows that Bob Carson was not an employee

of the company, as the Court of Appeals found. Wiley Magee was a paid member of the police force. Some witnesses say Townsend was there, but Vice-President Sullivan says Townsend was playing golf with him. That plaintiff might possibly have been able to show that other employees were there if the company's payrolls had been produced at the trial does not justify the inference, as contended by plaintiff, that other employees were there. The company did not willfully destroy its payrolls, as shown by the return to the *subpoena duces tecum* (R. 63).

In that connection, the chronology of this case is interesting. The shooting took place November 22, 1919. The belated suit was filed November 6, 1920, about two weeks before the statute of limitation would have run. The case was at issue April 19, 1921, after various exceptions had been heard, maintained and overruled, etc. The *subpoena duces tecum* issued April 23, 1925. The trial began April 30, 1925.

On the return to the *subpoena duces tecum* (R. 62) the company showed that, in accordance with its long established practice, its payrolls were destroyed at the expiration of three years and that it was, therefore, unable to produce the payrolls called for. The company had no reason to assume that in destroying its old payrolls in accordance with a long established practice, it was destroying evidence which might be required by plaintiff and from the destruction of which an unfavorable presumption is now sought to be drawn. No large company can be expected to provide storage for a lot of ancient and worthless records, such as payrolls, and no unfavorable presumption can be drawn

from the establishment and following of a practice to destroy them periodically.

On page 11 of petitioner's brief, it is stated:

> "The mob immediately took possession of Williams' office and garage, stationed guards at the door and refused to allow anyone to come in and the preponderance of evidence is that they placed guns of their own on the floor next to the bodies of Williams, Bouchillon and Gaines in order to prove that the latter were ready to resist arrest. They carried these guns with them but they did not produce them in court on the trial of this cause."

These statements are not supported by the record. The mob did not take possession of Williams' office and garage. The Chief of Police testified (R. 552) that he arrived on the scene a few minutes after the shooting, the posse by arrangement between the Chief of Police and the Commissioner of Public Safety having been under command of the Commisisoner of Public Safety and that he took charge of the situation and placed the guards. The Chief of Police testifies as to the weapons and ammunition found and so do other witnesses. It is true that only one gun was produced at the trial, that gun bearing marks of having been through a shooting affray. The Coroner (R. 851) testified that he turned the guns over to the grand jury together with the inquest papers; evidently some of them were thereafter lost. Certainly the defendant cannot be charged with responsibility for not producing these guns and the positive testimony of witnesses

cannot be destroyed by failure to produce the guns. The company had no reason to assume that it would ever be called upon to defend a law suit and to produce these guns. This belated suit was filed nearly twelve months after the incident. The guns were not in the company's possession; they were in possession of the Court authorities. That Bouchillon and O'Rourke left Williams' office armed with shotguns, paraded Columbia Road armed with shotguns and were seen to enter Williams' office armed with shotguns is undisputed and conceded.

On page 11 of petitioner's brief, the Court is asked to draw an unfavorable inference from the fact that Mr. Sullivan, Vice-President of the company, was playing golf when the whistle blew; that he took no interest in the matter, made no inquiry as to why the alarm was sounded but calmly continued playing golf and that Mr. Sullivan did not protest against the blowing of the whistle nor the slaughter which it had caused but, on the contrary, by his silence and his conduct thereafter, after his return, approved and ratified what had been done.

The playing of golf at one o'clock on a Saturday afternoon (legal half-holiday) can hardly be regarded as a purpose to establish an alibi. Mr. Sullivan testified that, when he heard the whistle, he thought it was a fire and he went to the City Hall. It will be remembered that Mr. Sullivan had then only recently returned to Bogalusa. He was not there during the weeks of troublesome incidents which the record discloses. The request of the police authorities to make

use of the whistle was addressed to Assistant Manager Cassidy in the absence of Mr. Sullivan, and this whistle had never been blown for police purposes since Mr. Sullivan's return. Therefore, it is entirely reasonable that Mr. Sullivan should have assumed that there was no disturbance and his action in going from the golf links to the City Hall was entirely reasonable.

There was no occasion for Mr. Sullivan to protest against the blowing of the whistle or the alleged slaughter and he did not, by his silence and conduct, approve and ratify the same. He testified he knew nothing of the Dacus incident and likewise knew nothing of the Bouchillon-O'Rourke-Dacus march or warrants and no unfavorable presumption can or should be drawn from the fact that he was playing golf on a Saturday afternoon and, upon hearing the whistle, went to the City Hall. That is where any reasonable man would have gone, especially as we must bear in mind that for several weeks prior to the date of the shooting Bogalusa was quiet and there had been no disturbances.

On page 42 of petitioner's brief, it is stated:

> "That there was evidence tending to show that there was no personal animosity on the part of the members of the mob, nor of special police officers against Williams, but that the destruction of the labor union, both black and white, in Bogalusa, which was in the path of the Great Southern Lumber Company, was the only motive for the killing of Williams and the other labor leaders."

It is true that there was evidence to show that there was no personal animosity on the part of anybody to Williams, but this record is bereft of any evidence tending to show, or from which any inference can be drawn, that the motive for the killing of Williams sprung from the company's desire to destroy organized labor. The record shows that before and after the killing of Williams there were large numbers of union men in the employ of the company.

On page 43 of petitioner's brief, it is stated that Judge Dawkins said:

> "That the Self-Preservation and Loyalty League had as one of its purposes, acquiesced in by the defendant lumber company and participated in by some of its employees, the promoting of the stand taken by the defendant company in its dealings with the labor union."

This statement by Judge Dawkins finds no support in the record. We challenged our opponent in the Circuit Court of Appeals, as we challenge them here, to point to any evidence which supports this statement or from which any inference in support of it can be drawn.

The Self-Preservation and Loyalty League was organized by the substantial citizens of Bogalusa to protect themselves, their families and their homes in a reign of terror that had been established by Williams and his associates. The company had no part in the organization of the league, nor in any of its activities. Its officers and its employees were expressly excluded

from membership in the league, as were all members of the union.

Judge Dawkins did not preside at the trial of this cause. After the verdict, a motion for new trial was made and argued before Judge Beattie. He had the matter under advisement for months and died before passing on the motion. Judge Dawkins heard the motion after Judge Beattie's death and overruled the motion in April, 1926, nearly one year after the verdict was rendered. The inference drawn by Judge Dawkins from the voluminous typewritten record was contrary to the facts found and inferences drawn by the three Judges of the Circuit Court of Appeals. That Judge Beattie who presided at the trial had doubts concerning the verdict may reasonably be assumed from the fact that he held the case under advisement for a number of months.

If we accept at full value all of the erroneous statements and conclusions in petitioner's brief, there is no evidence to show that the Great Southern Lumber Company, its officers and agents, participated in any conspiracy to kill Williams or killed Williams while acting within the scope of their employment as officers and agents of the defendant company.

There is no evidence in this record to show, or from which any inference can be drawn, that the defendant company desired to eliminate Williams from the labor situation in Bogalusa and that that desire furnished the motive for the shooting of Williams. On the contrary, the record abounds in proof that the company had no part in this unfortunate occurrence and

that the shooting of Williams, after several weeks of calm and quiet, was the direct result of the provocative acts of Bouchillon, O'Rourke and Dacus by public officers charged with the enforcement of law. The trouble was between Williams and his associates on the one hand and the people and the authorities on the other hand. No property of the company was threatened. No business of the company was menaced. The Columbia Road incident took place nearly a mile from the company's property. No employee of the company, if any, who took part in the shooting, had any reason to assume that he was engaged in the discharge of the duties of his employment and that he was entitled to bind the company by his act. If any employee took part, it was a personal adventure on his part, totally disassociated from and disconnected with any interest or business of the company.

Plaintiff must establish her case by facts and the fair and reasonable inferences to be drawn therefrom.

Petitioner argues (Brief, page 30) that because the Circuit Court of Appeals remanded the case on technical grounds relating to the admission and rejection of evidence, it thereby indicated that the District Court did not err in denying a motion for a directed verdict. It is difficult to follow the process of reasoning by which this conclusion is reached in view of the very specific language of the Court of Appeals in its opinion. The Court definitely held that the error in excluding competent evidence and in admitting incompetent evidence prejudiced the defendant and required a reversal of the judgment. The Court then stated that there was no evidence in this record establishing a con-

spiracy or showing that any employee of the defendant, who may have been present at the shooting, acted within the scope of his authority. If the Circuit Court of Appeals had reversed the case on the ground that the motion to direct a verdict should have been granted, the case might well have come back to the Circuit Court of Appeals, after another trial, with material evidence again excluded and incompetent evidence again admitted. The Court, having found that prejudicial error resulted from the admission and exclusion of evidence requiring a reversal, then observed that, on this record, the motion to direct should have been sustained, but as the record next time might be different, it was obviously unnecessary to reverse on the specific ground that the motion to direct should have been granted. All that the Circuit Court of Appeals could do was to order a new trial, and that it has done.

Petitioner also argues (Brief, page 39) that counsel for defendant were evidently of the same opinion (whatever that means) since at the close of plaintiff's evidence, they did not request a directed verdict, but, on the contrary, introduced numerous witnesses.

There is, so far as we know, no penalty attaching to awaiting the conclusion of all the evidence before moving to direct the verdict. The blowing of the siren whistle, so strongly relied upon by plaintiff, was unexplained in plaintiff's testimony. Defendant's testimony unqualifiedly exculpated defendant from any responsibility for that act.

At the conclusion of plaintiff's testimony, there was no evidence of the Bouchillon-O'Rourke-Dacus in-

cident and, therefore, no explanation of the reason for summoning the posse and no evidence that any warrants had been issued for the arrest of Bouchillon, O'Rourke or Dacus. At the conclusion of plaintiff's evidence, there was nothing to indicate that the Self-Preservation and Loyalty League had been organized and why it had been organized. There was no evidence tending to show the lawlessness that existed in Bogalusa during the period in question. All of these facts were developed in defendant's testimony. They stand uncontradicted on the record. Therefore, at the conclusion of the case, defendant properly moved for a directed verdict and the District Court should have granted that motion as the Court of Appeals in effect held.

SUMMARY.

(1) The Circuit Court of Appeals was correct in ordering a new trial on the ground that competent and material evidence was excluded and incompetent evidence was admitted and that injury and prejudice to the defendant resulted in both instances;

(2) The Circuit Court of Appeals was correct in holding that there was no evidence in this record to show that this defendant participated in any conspiracy or that Williams was killed by agents of the defendant acting within the scope of their authority;

(3) The Circuit Court of Appeals and the District Court should have held that the action in behalf of the minor was barred by prescription (limitation) and that the cause of action based upon a conspiracy was barred by prescription both as to the claims of the widow and the minor;

(4) Accordingly, the judgment of the Circuit Court of Appeals should be amended by dismissing the suit on behalf of the minor and dismissing the cause of action of the widow, based on an alleged conspiracy and, as amended, should be affirmed.

Respectfully submitted,

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February, 1928.